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IN THE

Supreme Court of the United States

HECTOR ADAMES, JR., *ET AL.*,

Petitioners,

v.

BERETTA U.S.A. CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Questions Presented are:

Section 4(5)(A)(iii) of the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7903 (5)(A)(iii) (2005), bars certain lawsuits against the firearms industry when based on state common law, but allows the same claims when based on a state statute "applicable to the sale or marketing" of firearms, thus preempting state law based on which branch of state government authorized it rather than based on the sweep or content of the state law.

1. Does the Tenth Amendment prohibit Congress from preempting state law based only on whether the law is the product of legislation rather than authoritative judicial decision?

2. Are cases alleging a violation of the Tenth Amendment evaluated solely on whether the federal action being challenged "commandeers" a state executive or legislative officer, or does the analysis also include whether the challenged action attempts to revise or interfere with the structure and sovereign decisions of state government?

3. Do this Court's statutory construction canons and preemption jurisprudence allow courts to construe the language of the PLCAA to preempt state product liability actions broadly despite Congress' clearly stated intent not to bar such actions?

PARTIES TO THE PROCEEDINGS

Petitioners are Hector Adames, Jr. and Rosaliz Diaz as co-special executors of the estate of Joshua Adames, deceased.

Respondent is Beretta U.S.A. Corporation.

Because Petitioners are questioning the constitutionality of a federal statute, 15 U.S.C. §§ 7901-7903 (2005), 28 U.S.C. § 2403(a) (1976), may apply.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Hector Adames, Jr., *et al.*, respectfully Petition for a Writ of Certiorari to review the judgment of the Supreme Court of Illinois in this case.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (App., *infra*, 1a-47a) is reported at 909 N.E.2d 742 (Ill. 2009), the Illinois Court of Appeals decision (App. 49a-100a) is reported at 880 N.E.2d 559 (Ill. Ct. App. 2007), and the order of the Illinois Circuit Court granting Defendant Beretta's Motion for Summary Judgment (App. 103a-104a) is unreported but available at 2005 WL 6088769 (Ill. Cir. Ct. Aug. 23, 2005).

JURISDICTION

The Illinois Supreme Court's judgment was entered on March 19, 2009. A timely petition for rehearing was denied on May 26, 2009 (App. 101a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (2008).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

(See Appendix 105a-115a)

INTRODUCTION

This case raises core issues of federalism and statutory construction that have confounded the lower courts, and require clarification from this Court: Does the Tenth Amendment permit Congress to dictate which branch of state government may authorize liability against a particular industry so long as the federal enactment does not "commandeer" state officials? In upholding the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et. seq.*, the Illinois Supreme Court – like the Second Circuit before it – answered that question affirmatively, deferring to Congress when it determined which branch of state government it would recognize as the authoritative expositor of state law, as well as limiting the scope of the Tenth Amendment to its anti-commandeering principle. The approach adopted by those two courts cannot be reconciled with our system of federalism and this Court's guidance is needed to establish the scope of that Amendment's structural limitation on congressional power, as well as to resolve the conflict among the circuits.

This Court's guidance is further needed to clarify whether the Illinois court properly construed federal law and this Court's preemption jurisprudence when the Illinois court held that the PLCAA broadly preempted state law, even though the structure, purpose, and legislative history of the Act establish that Congress did not intend to bar products liability claims such as Petitioners'. Determining the scope and breadth of the PLCAA is an issue of pressing national importance that courts nationwide are continually struggling with and which requires this Court's definitive construction.

STATEMENT OF THE CASE

A. The Statutory Scheme

The Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901 *et. seq.*, enacted by Congress on October 26, 2005, orders every court, state or federal, to "immediately dismiss" any "qualified civil liability action" (hereafter, "Qualified Action") pending on the date of enactment, and to bar the courthouse doors to all future Qualified Actions. 15 U.S.C. § 7902(a), (b). With certain exceptions, a Qualified Action is defined as any proceeding brought "against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A).

The PLCAA states its operative purpose as prohibiting causes of action against firearms companies and trade groups "for the harm *solely caused*" by criminal or unlawful misuse of guns or ammunition, when the product functioned as intended. *Id.* at § 7901(b)(1) (emphasis added).

The PLCAA establishes that certain categories of proceedings are not Qualified Actions, including, significantly, certain product liability actions, 15 U.S.C. § 7903(5)(A)(v), and actions that allege that the "manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product," a limitation known as the predicate exception. *Id.* at § 7903(5)(A)(iii); App. 111a. Under the predicate

exception, an action identical to one that could not be brought because it was a product of judicial decision or state common law is exempted when it is a product of state or federal legislative authorization.

In findings supporting the act, Congress made clear its anti-judicial, pro-legislative objective in enacting the PLCAA. In its view, certain liability actions against gun manufacturers and dealers had been brought "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* at § 7901(a)(7). To Congress, such actions could only be sustained by a "maverick judicial officer or petit jury [and] would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States." *Id.* Thus, the PLCAA exists as an expression of congressional pique at plaintiffs "us[ing] the judicial branch to circumvent the Legislative branch" and at judges the Congress viewed as complicit in that evasion. *Id.* at § 7901(a)(8). Moreover, Congress declared that one of the imperatives justifying the enactment of the PLCAA was the need for Congress to act to preserve each State's separation of powers. H.R. Rep. No. 109-124, at 20 (2005).

B. Proceedings Below

On May 5, 2001, thirteen-year old Billy Swan found his father's Beretta 92FS handgun and removed the magazine that contained its ammunition, believing that this action had unloaded the gun. The gun, however, did not contain one of several commonplace safety features that either

warned users when a round remained in the chamber or otherwise prevented the gun from firing when "unloaded" in this fashion. App. 4a. In fact, manufacturer Beretta did not equip the gun with safety features developed more than 100 years ago to prevent the "danger of an unintentional discharge of the cartridge,"[1] including a device "indicating whether or not a gun is loaded" to obviate "the many accidents occasioned by the discharge of guns that are not supposed to be loaded."[2] Believing the gun unloaded, Billy pulled the trigger of the "unloaded" gun, and the bullet hidden in the chamber killed his 13-year-old friend, Josh Adames. App. 4a-5a.

Petitioners, Josh's parents, filed this action in the Circuit Court of Illinois, alleging counts of design defect, failure to warn, and breach of the Implied Warranty of Merchantability. App. 14a. The complaint alleged that the firearm was unreasonably dangerous as Beretta failed to include effective warnings that indicated to foreseeable users when a round remained in the chamber or that alerted users that the gun could fire when its magazine was removed, as well as failed to include a magazine disconnect safety, a $10 device invented a century earlier to prevent precisely these sorts of accidents from occurring. App. 14a-15a.

On August 23, 2005, the Circuit Court granted Beretta's Motion for Summary Judgment. App. 103a-104a. Petitioners appealed the Circuit Court's dismissal of their design defect and failure to warn claims. App. 50a. The Illinois Court of Appeals

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[1] U.S. Patent No. 808,463 (issued Dec. 26, 1905).

[2] U.S. Patent No. 439,551 (issued Oct. 28, 1890).

affirmed the Circuit Court's decision that "summary judgment was proper" for the design defect claim. App. 85a. However, the Appellate Court held that the "plaintiffs' failure to warn claim presented a question of fact and should have survived summary judgment." App. 92a. The Appellate Court rejected Petitioners' claim that the PLCAA was unconstitutional, but held that Petitioners could bring a failure to warn claim under the PLCAA's product liability exclusion, § 7903(5)(A)(v). App. 92a. Both Petitioners and Respondent Beretta appealed to the Supreme Court of Illinois. The Supreme Court affirmed the Court of Appeals decision finding the PLCAA was constitutional, because it found that "the PLCAA does not commandeer any branch of state government because the PLCAA imposes no affirmative duty of any kind on any branch of state government." App. 45a.

The court also reversed the decision of the court below that had allowed the failure to warn claim to go forward, instead, holding that the PLCAA required dismissal of that claim as well. App. 46a. The Illinois Supreme Court found that the failure to warn claim fell within the immunity granted by the PLCAA because Billy's unintentional shooting of his friend with a gun he thought to be unloaded still constituted a "criminal offense," App. 46a, and constituted a "volitional act," even though "Billy did not intend the consequences of his act." App. 42a. The court held that Congress intended "volitional" to require no more than Billy "choose and determine to point the Beretta at Josh . . . [and] pull the trigger." App. 42a. The court therefore concluded that the Act's product liability exclusion did not apply and Petitioners' "failure to warn claims were barred by the PLCAA." App. 46a.

Because it concluded that the PLCAA barred Illinois courts from applying Illinois law to grant relief to Petitioners from Beretta, the court never considered Petitioners' contention that Beretta was liable for a defect in design under Illinois state law. *See* App. 46a. Moreover, the court never overruled the intermediate appellate court's decision that, under Illinois law, Petitioners' failure to warn claim could constitute an action arising "from a defect in design or manufacture of the product," and was thus actionable under § 7903(5)(A)(v). *See* App. 98a.

Petitioners filed a timely petition for rehearing with the Supreme Court of Illinois, which was denied on May 26, 2009. App. 101a.

REASONS FOR GRANTING THE PETITION

Granting this petition would enable this Court to resolve a fundamental and critical Congressional challenge to Our Federalism, as well as answer a persistent and recurring issue that has confounded the lower courts over whether justiciable Tenth Amendment concerns focus solely on the anti-commandeering principle.

Section 7903(5)(A)(iii) of the PLCAA, 15 U.S.C. § 7901 *et seq.* (2005), constitutes a breathtaking and unprecedented attempt to control how states make law by dictating which branch of state government may impose legally actionable duties upon a politically powerful industry. Rather than prescribe certain substantive limits on the content of such laws, the PLCAA dictates which branch may legally originate enforceable state-imposed duties. Congress indicated its approval of duties imposed by a cognate legislative body while overriding identical duties

when they are imposed by a state court applying state common law.

Congress indicated that it undertook this unprecedented expedition into the heart of state lawmaking in order to preserve each State's separation of powers, H. Rep. No. 109-124, at 20, a stance that raises important questions about the Tenth Amendment's force in support of state sovereignty. The problem posed grows exponentially when Congress takes such approach based solely on its Commerce Clause authority, as it did here. In today's challenging economic environment, the statute stands as an inviting model to provide relief to other industries resisting common-law liabilities and thus raises an issue of continuing and recurrent national importance.

The Illinois Supreme Court made basic and fundamental doctrinal errors in its federalism analysis. Like the Second Circuit before it, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 397 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (Mar. 9, 2009), the Illinois court improperly narrowed the Tenth Amendment's protection of state sovereignty to a simplistic inquiry into whether Congress has commandeered state executive or legislative branch officers by requiring them to undertake affirmative actions on behalf of the federal government. Giving our federalist system that limited scope ignores the "residuary and inviolable sovereignty" of the States, *Printz v. United States*, 521 U.S. 898, 899 (1997) (quoting THE FEDERALIST No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)), and their retention of "substantial sovereign powers" under our constitutional scheme. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). These retained powers "are

numerous and indefinite" and "extend to all the objects which, in the ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Id.* at 458 (quoting THE FEDERALIST No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961)).

In a case that alleges improper interference with a State sovereign's structural integrity, like this one, the Illinois Supreme Court asked the wrong question. Instead, this case required resolution of three key legal questions: (1) whether the statute appears to regulate the States as States; (2) whether the regulation concerns itself with attributes of state sovereignty; and (3) whether compliance would impair a state's ability to structure integral operations in areas of traditional governmental functions. The PLCAA fails such an inquiry and should not have been sustained.

This Court and many lower courts have consistently distinguished between permissible federal legislation directly regulating commerce and impermissible legislative interference with fundamental state decisions about the functioning and structure of their governments. However, in a series of recent cases, this Court has focused its attention on federal laws that impermissibly commandeered state executive or legislative action to carry out a federal regulatory scheme. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Erroneously, and in conflict with precedents of this Court and decisions of several circuits, the Supreme Court of Illinois has joined the Second Circuit in holding that Congress violates the Tenth

Amendment *only* when it engages in such commandeering. This unduly narrow reading of these cases significantly imperils state sovereignty. By granting this petition, this Court can clarify the proper scope of state sovereignty, the appropriate analysis of Tenth Amendment claims, and the limitations the Tenth Amendment imposes on congressional interference with fundamental functions of state government, such as the process of making law.

Importantly, these significant legal questions come to this Court in a lawsuit that best represents the interests that our federalist system is meant to protect, and at a time when the incentives for Congress to overstep its bounds are greatest. The questions arise out of an individual citizen's cause of action for serious harm allegedly caused by a defective product. As this Court has explained, state sovereignty is protected for the sake of individual citizens, *see New York*, 505 U.S. at 181, like the Plaintiffs in this case. Furthermore, in a time of economic crisis, Congress will have great incentive to take similarly restrictive legislature measures. However, the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *Printz*, 521 U.S. at 933 (quoting *New York*, 505 U.S. at 187). This case thus arises at a time when a robust reaffirmation of the Tenth Amendment limitations on Congress will be of the greatest importance.

At the same time, this petition presents this Court with the first opportunity to construe the extent to which a federal statute, the PLCAA,

displaces certain traditional state-law actions that the law's stated findings, purposes, structure, and legislative history indicate were not intended to be within the scope of the immunity conferred by the PLCAA. In holding that the PLCAA requires dismissal of the defective-design and failure-to-warn claims put forth by Petitioners, the Illinois Supreme Court took a road along the route of statutory construction that is at fundamental odds with this Court's instruction that "the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress," expressed either in an Act's language, or "implicitly contained in [the Act's] structure and purpose." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) and *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Moreover, just as this Court has held that "'the purpose of Congress is the ultimate touchstone in every pre-emption case,'" *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), the preemptive effect of the PLCAA should have been analyzed in terms of congressional purpose. If that had occurred, it is clear that the PLCAA would not have foreclosed Petitioners' lawsuit, as such products liability actions were outside the scope of Congress' concern in enacting the PLCAA.

I. THE UNDULY NARROW READING OF THE TENTH AMENDMENT BY THE ILLINOIS SUPREME COURT CONFLICTS WITH THE BROAD PROTECTION OF STATE SOVEREIGNTY IN THE HOLDINGS OF SEVERAL CIRCUIT COURTS AND THIS COURT'S PRECEDENTS

In following the Second Circuit's holding in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (Mar. 9, 2009), the Illinois Supreme Court limited the "'the critical inquiry with respect to the Tenth Amendment'" to "'whether the PLCAA commandeers the states." App. 44a (quoting *City of New York*, 524 F.3d at 396).

Under that skewed reasoning, any Act of Congress conforms to the Tenth Amendment so long as it does not commandeer the legislative or executive branches of the States. This view is inconsistent with the broad federalism concerns that this Court and several circuit courts have identified as crucial to the determination of whether Congress has intruded too deeply into fundamental attributes of state sovereignty. Our system of dual sovereignties is designed to prevent both the federal and state governments "from destroy[ing] the other [or] curtail[ing] in any substantial manner the exercise of its powers." *New York v. United States*, 505 U.S. 144, 163 (1992) (quoting *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926)). The PLCCA transgresses that bright line, and the Illinois decision finds that transgression permissible, because it gives improperly short compass to the Tenth Amendment.

The underlying statute and the analysis employed by the decision below fail to show the proper deference to "the constitutional role of the States as sovereign entities." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Besides its anti-commandeering mandate, federalism places limitations on congressional designs that interfere with the structure and operation of state government,[3] as well as on the scope of Congress' enumerated powers and authority to preempt state law.[4]

Congress' clearly expressed preference for legislative determinations of grounds for liability over judicial applications of the common law in the PLCAA dictate to the States how its law must be made, at least when liability is to be assessed against the firearms industry. 15 U.S.C. § 7903(5)(A)(iii) (creating an exception to the immediate-dismissal dictate so long as the lawsuit is authorized by certain legislative actions); *see also* 15 U.S.C. § 7903(2)(a)(7) (finding stating that liability actions against gun manufacturers and dealers could only be imposed "by a maverick judicial officer or petit jury [and] would expand civil liability in a manner never contemplated by the framers of the Constitution, *by Congress, or by the legislatures of the several States*")

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[3] *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 50 (1988).

[4] *See, e.g., United States v. Lucas*, 514 U.S. 549, 555 (1995) (recognizing that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government.'") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

(emphasis added); *Id.* at § 7901(a)(8) (finding stating that plaintiffs in the actions intended to be preempted were "us[ing] the judicial branch to circumvent the Legislative branch").

The evident congressional pique at the judicial role in sustaining these lawsuits plainly establishes that the PLCAA expressed Congress' mandatory determination of which branch of state government will be recognized by the Federal Government as the authoritative expositor of the State's pertinent laws. Such an exercise of congressional power is at odds with this Court's repeated declarations that "rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). *See also Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

A congressional enactment, like the PLCAA, that denies state courts authority to declare the law and requires instead exclusive reliance on state legislatures for the definitive pronouncement of that state's law invades state sovereignty unconstitutionally, even when it does not "commandeer" any branch of state government. After all, it is "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981) ("States are free to allocate the lawmaking function to whatever branch of state

government they choose.") (citations omitted); *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902) (federal government may not require a state respect the federal system of separation of powers within its own government).

The Illinois decision below, and the Second Circuit decision upon which it relied, conflicts with the broader scope accorded the Tenth Amendment in other circuits. For instance, when the Fourth Circuit upheld the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228 (2000), it explained that a Tenth Amendment challenge to a federal statute involves two questions: (1) whether the law falls within the enumerated powers of Congress; and (2) whether the means of regulation employed impermissibly infringes upon state sovereignty. *United States v. Johnson*, 114 F.3d 476 480 (4th Cir.), *cert. denied*, 522 U.S. 904 (1997) (citing *New York*, 505 U.S. at 159, 188). To answer the second question, the *Johnson* court looked well beyond whether Congress had commandeered the states, explaining that in *New York*, this Court established the principle that Congress cannot adopt legislation that "effectively regulates the 'states as states' and thereby impermissibly invades by this means state sovereignty." 114 F.3d at 481.

Like the Fourth Circuit, when the First and Tenth Circuits upheld the CSRA, they looked at effects on state sovereignty well beyond commandeering. They set out "three ingredients" necessary to show that an act of Congress has violated the Tenth Amendment: "(1) the statute must

regulate the 'States as States,' (2) it must concern attributes of state sovereignty, and (3) it must be of such a nature that compliance with it would impair a state's ability 'to structure integral operations in areas of traditional governmental functions.'" *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981) (internal citations and quotation marks omitted)); *accord United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997). The Third Circuit employs the identical test. *See Kramer v. New Castle Area Transit Auth.*, 677 F.2d 308, 309 (3d Cir. 1982). *Cf. Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("In determining whether the congressional action violates the limitations of the tenth amendment, we must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions.").

This test, which Petitioners submit is the correct test, calls for a deeper inquiry into a federal statute's impact on key elements of state sovereignty than that undertaken by the Illinois Supreme Court or the Second Circuit. Moreover, this approach is in harmony with this Court's anti-commandeering jurisprudence. The PLCAA clearly fails this test, as it infringes on states' authority to determine which branch of state government establishes liability standards to be applied by state courts, which are "attributes of state sovereignty," that "would directly impair [a state's] ability 'to structure integral operations in areas of traditional governmental functions.'" *Hodel*, 452 U.S. at 288 (citation omitted).

Each of these tests calls for a deeper inquiry into a federal statute's impact on key elements of state sovereignty. Moreover, these tests are in harmony with this Court's decisions annulling federal legislation for commandeering states. The decisions demonstrate that the Tenth Amendment protects state sovereignty from a wide range of threats. *See, e.g., New York*, 505 U.S. at 188 ("*Whatever the [other] limits of [state] sovereignty may be*, one thing is clear: The Federal government may not compel the States to enact or administer a federal regulatory program." (emphasis added)). When this Court said in *New York* that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions," 505 U.S. at 162, it cited *Coyle v. Smith*, 221 U.S. 559, 564 (1911), a non-commandeering decision which upheld Oklahoma's right as a sovereign state to relocate its own capital without federal interference.

Like the Illinois Supreme Court and the Second Circuit, the Seventh and District of Columbia Circuits limit their Tenth Amendment analyses to the anti-commandeering principle. *See United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1996); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999). The clear conflict between decisions of these circuits, as well as the Second Circuit and the Illinois Supreme Court, with decisions of the First, Fourth, Fifth, and Tenth Circuits require resolution by this Court.

II. THE UNDULY NARROW READING OF THE TENTH AMENDMENT BY THE ILLINOIS SUPREME COURT PRESENTS AN ISSUE OF GREAT NATIONAL IMPORTANCE

If Congress, in the exercise of its Commerce Clause power may dictate which branch of state government is the authoritative expositor of state law, our system of dual sovereignty, "each protected from incursion by the other," *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (citation omitted), is endangered. Reliance solely on the anti-commandeering principle to protect state sovereignty, as the court below held appropriate, is inadequate to serve our federalist system and provides but one method by which to evaluate whether the federal government has usurped the states' constitutional role.

Because of the fundamental importance of federalism to our constitutional structure, this case provides an important opportunity for this Court to define the contours of the protections afforded to state sovereignty by the Tenth Amendment. As this Court noted in *New York*, the Constitution protects state sovereignty not for the sake of state government or state officers, but for the benefit of the individual citizen. 505 U.S. at 181. The boundaries of our federalism must be respected so that citizens know whom to hold accountable with respect to their laws. *See id.* at 168.

Beyond Congress' lack of authority to restructure state government, *see Gregory*, 501 U.S. at 460, or to determine which branch of state government may discharge which governmental duties, *see Clover Leaf Creamery Co.*, 449 U.S. at 463, Congress erred when

it thought it had the power to preserve state separation of powers, H.R. Rep. No. 108-59, at 19 (2003), and to prevent plaintiffs from "us[ing] the [state] judicial branch to circumvent the [state] Legislative branch." *Id.* at § 7901(a)(8). *See Sweazey v. New Hampshire*, 354 U.S. 234, 256 (1957) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states.") (Frankfurter, J., concurring).

Moreover, this is not an instance of preemption as it has heretofore been understood. Although Congress may preempt state law under the Supremacy Clause by creating a different and separate federal rule, *see Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000), Congress has not engaged in that type of replacement of state law. The PLCAA preempts state law that authorizes certain litigation against the gun industry when that authorization is the product of the common law or judicial construction, but permits each State to reclaim that authorizing prerogative through state legislation. Under the PLCAA, states retain their preexisting discretion to define the legal duties of firearms dealers and manufacturers and create causes of action for breaching those duties. However, Congress directed that this state authority must be exercised through statutes "applicable to the sale or marketing" of firearms, rather than more generally or through judicial construction. 15 U.S.C. § 7903(5)(A)(iii). Thus, Congress has evinced no intention to preempt state law, only to displace state judicial authority. That power, however, is "reserved by the Constitution to the several States." *Erie R.R. Co*., 304 U.S. at 80. It is axiomatic that the "case for

federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U. S. 141, 166-67 (1989) (internal quotation marks omitted). Here, Congress has not prohibited all third-party lawsuits against the gun industry. Instead, it has acted only on the basis of an anti-judicial animus that is outside its power. There is no constitutional warrant for that concern.

It is clear that Congress' purpose in enacting the PLCAA to prevent a "maverick judge or petit jury" from imposing civil liability against a firearms manufacturer, dealer, or importer, without prior legislative approval, cannot supply a legitimate justification for its obvious interference with choices belonging to each sovereign state and cannot be considered a proper exercise of Commerce Clause authority. Thus, the PLCAA is not standard economic regulation under the Commerce Clause in which Congress defines legal duties regarding some aspect of interstate commerce and sweeps aside state regulation in the field. *See FERC v. Mississippi*, 456 U.S. 742, 759 (1982). Instead, the target of § 7903(5)(A)(iii) is the ability of state courts to interpret state statutes and make common law. Congress' intent as evidenced from the text of the PLCAA was thus to restrain state courts in their exercise of what some might view as state lawmaking power, rather than regulate the content of state law.

This intent to nullify state court lawmaking is also apparent in the law's legislative history. The

House Judiciary Committee "recognized the phrase 'state law' to include common law as well as statutes and regulations," H. Rep. No. 109-124, at 19 (2005) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 522 (1992)), and said Congress' objective was to preserve separation of powers, which it described as "'implicitly embedded' in the constitutions and laws of every state." *Id.* at 20 (quoting *City of S. Euclid. v. Jemison*, 503 N.E.2d 136, 138 (Ohio 1986)). Congress claimed it was protecting democratic processes from plaintiffs "seeking to achieve through the courts what they have been unwilling or unable to obtain legislatively." H. Rep. No. 109-124 at 20; *see also* 151 Cong. Rec. S9088 (daily ed. July 27, 2005) (statement of Sen. Craig) (arguing that legislators, not courts, should toughen firearms regulation, if necessary). Indeed, PLCAA supporters contended that 33 state legislatures had adopted limitations on their courts akin to those in the PLCAA. *Id.* at S9099; *id.* at H8885 (daily ed. Oct. 18, 2005) (statement of Rep. Bass). Thus the net effect of § 7903(5)(A)(iii) is to impose similar limits on courts in the remaining states whose democratically elected representatives did not see fit to draw Congress' desired boundaries between statutory and common law regulation.

The PLCAA thus dictates to the states which branch of their government may authoritatively articulate state law: the legislature can, the courts cannot. This is an invasion of the kind of state-government decisions that this Court explained in *Gregory v. Ashcroft* are "of the most fundamental sort for a sovereign entity." 501 U.S. at 460. Decisions regarding "the separate duties of the judicial and political branches of the state governments . . . 'go to the heart of representative government.'" *Alden*, 527

U.S. at 751 (quoting *Gregory*, 501 U.S. at 461)). Whether a law is "declared by [the state's] Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. Co.*, 304 U.S. at 78. Furthermore, Congress' separation of powers concerns are of no moment, for "the doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. United* States, 445 U.S. 684, 689 (1980).

If the ability to decide judges' qualifications—the state power at issue in *Gregory*—lies at "the heart of representative government," 501 U.S. at 463, the same must be true when states determine the respective roles of their legislatures and courts in lawmaking, the most fundamental sovereign power. *See Clover Leaf Creamery Co.*, 449 U.S. at 463 ("States are free to allocate the lawmaking function to whatever branch of state government they may choose."). Thus, when Congress abrogated the authority of state courts to declare state law and allocated that authority exclusively to state legislatures, it disregarded the wise restraints placed on it by the Constitution. This invasion of state sovereignty must be held unconstitutional.

This unprecedented incursion into the heart of state governmental structure is an issue of great national importance that requires this Court's attention.

III. THIS COURT SHOULD DETERMINE WHETHER THE PLCAA BROADLY PROHIBITS STATE COURTS FROM APPLYING ESTABLISHED STATE PRODUCT LIABILITY LAW

The Illinois Supreme Court held that the PLCAA preempts a broad class of products liability actions, traditionally available to injured plaintiffs, even though Congress sought to preempt only those claims "based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). The decision contravened this Court's repeated holdings that "'the purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). By ignoring congressional intent and abandoning traditional canons of statutory construction, the Illinois court gave the federal statute a scope and meaning that would inappropriately bar the courthouse doors to thousands of children and adults injured or killed as a result of defective guns.

Granting certiorari will enable this Court to provide much-needed clarification and guidance to courts repeatedly faced with construing the scope of this unprecedented law and will restore the proper authority of state courts to apply established law in cases where conduct long held tortious causes injury, consistently with Congress' declared intent.

A. Guidance is Needed Over How to Apply this Court's Canons of Statutory Construction to the PLCAA

The Illinois Supreme Court made no attempt to ascertain congressional intent with respect to traditional product liability actions, despite this Court's instruction that such intent guides the preemption determination. Congress exempted most products liability actions from the types of actions barred, including actions

> for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. § 7903(5)(A)(v).

As explained by the PLCAA's sponsors, under this product liability exception gun manufacturers would still be liable for their own negligence, defective manufacturing or failure to provide sufficient warnings about the safety of their product. For example, Senator George Allen, a prominent PLCAA sponsor, stated on the Senate floor, "This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on the [sic] firearms dealer or manufacturer or defective product,

a standard in product liability law." 151 Cong. Rec. S9389 (daily ed. July 29, 2005). The bill's floor leader and principle sponsor, Senator Larry Craig, made clear that the PLCAA "stops only one extremely narrow category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over which they have no control." 151 Cong. Rec. S9088 (daily ed. July 27, 2005). Senator Craig emphasized that the "bill will not prevent a single victim from obtaining relief for wrongs done to them by anyone in the gun industry." 151 Cong. Rec. S9395 (daily ed. July 29, 2005). *See also* 151 Cong. Rec. S9099 (daily ed. July 27, 2005) (Sen. Craig) ("As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . If manufacturers or dealers break the law or commit negligence, they are still liable."); 151 Cong. Rec. S9107 (daily ed. July 27, 2005) (Sen. Baucus) ("This bill . . . will not shield the industry from its own wrongdoing or from its negligence."); 151 Cong. Rec. S9226 (daily ed. July 28, 2005) (Sen. Graham) (the Act "doesn't relieve you of duties that the law imposes upon you to safely manufacture and to carefully sell," but Congress was "not going to extend it to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product").

Instead, the bill's sponsors stressed that "[t]he only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle." 151 Cong. Rec. S9099 (daily ed. July 27, 2005) (Sen. Craig). *See also* 15 U.S.C. § 7901(a)(7) (stating the purpose was to prohibit lawsuits "based on theories without

foundation in hundreds of years of the common law and jurisprudence of the United States."). Congress made plain that the object of the legislation was to prevent "an expansion of liability" beyond familiar common law concepts; in fact, one legislative finding referred to this liability "expansion" three times. *Id.*

The Act's findings, purposes, and legislative history establish Congress' intent to bar only suits that imposed liability on the gun industry where the gun manufacturer or seller did no wrong, but their products were used in crime.[5] They specifically preserved traditional product liability lawsuits like the instant action.[6] Because the Illinois Supreme Court's approach to preemption is at odds with this Court's pronouncements, threatens to undermine products liability lawsuits involving the firearm industry throughout the nation, and provides a potential blueprint for similar misconstruction of federal statutes, this case presents an issue of great national importance sufficient to warrant this Court's attention. Certiorari should be granted.

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[5] Such liability was imposed in, for example, *Kelley v. R. G. Industries, Inc.*, 497 A.2d 1143, 1159 (Md. 1985), where the court created a novel theory of liability under which manufacturers and sellers of "Saturday Night Special" handguns may be held "strictly liable to innocent persons who suffer gunshot injuries from the criminal use of their products."

[6] *See, e.g., Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001) (gun maker could be held liable for failing to include feasible safety devices); *Hurst v. Glock*, 684 A.2d 970 (N.J. Super. A.D. 1996) (same).

B. A Definitive Construction of the Impact of the PLCAA on Traditional State Products Liability Actions Is an Issue of Great National Importance

In attempting to parse the meaning and scope of the PLCAA, the Illinois Supreme Court felt compelled to focus entirely on the language of the product liability exception, without consideration of the Act's purposes, findings, and legislative history. The resulting confusion led the court to conclude that Congress directed all courts to dismiss state defective-design and failure-to-warn claims such as Petitioners,' even though Congress intended to preserve such actions.

In doing so, the Illinois court's approach reflected the difficulty courts throughout the nation have had when determining the meaning of federal law based on opposing statutory construction canons, which alternatively direct a focus on plain language readings of statutory terms, congressional intent as reflected by the legislative record, or readings that overcome problematic language by attempting to rend the statutory scheme "coherent and consistent," *United States v. Ron Pair Enterprises*, 489 U.S. 235, 240 (1989), or involve the doctrine of constitutional avoidance. *See Clark v. Martinez*, 543 U.S. 371, 380-82 (2005) (stating that, in choosing between competing statutory constructions, a court should choose the construction that avoids having to decide difficult constitutional questions).

The Illinois Supreme Court opted to examine only the law's explicit terms and did not consider Congress' intent to preserve traditional products liability claims. For example, the PLCAA's first

purpose states Congress' intent was to prohibit causes of action where "the harm is *solely caused by the criminal or unlawful misuse* of firearm products . . . when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (emphasis added). The term "solely" was specifically added after an earlier version of the statute failed in the Senate. *Compare* S. 1805, 108th Cong. § 2(b)(1) (2003), *with* 15 U.S.C. § 7901(b)(1). In the PLCAA's findings, Congress referred to "[t]he possibility of imposing liability on an entire industry for harm that is *solely caused by others* is an abuse of the legal system," again emphasizing its intent to bar liability cases only where the "sole" cause was a criminal act. 15 U.S.C. § 7901(a)(6) (emphasis added).

The Illinois Supreme Court's approach is one of two approaches that, in conflict, have been adopted by the various circuits. For example, six circuits have split over whether a provision of the Bankruptcy Code should be interpreted literally or as informed by the structure and purpose of the Code. The Fourth, Ninth, Eleventh, and Third Circuits all held that, based on the literal text of 11 U.S.C. § 365(c) (2006), debtors in possession may *not* assume a contract that grants a license without obtaining the licensor's consent, even if they do not intend to assign that contract. *See In re Sunterra Corp.*, 361 F.3d 257, 262 (4th Cir. 2004) (district court "recognized the existence of a circuit split on the issue of whether the Statute should be applied literally"). *See also In re Catapult Entm't, Inc.*, 165 F.3d 747 (9th Cir. 1999); *In re James Cable Partners*, 27 F.3d 534, 536-37 (11th Cir. 1994); *Matter of West Elecs., Inc.*, 852 F.2d 79, 83 (3d Cir. 1988). But the First and Fifth Circuits, relying on the purpose and "relevant legislative history" of the statute,

concluded that Congress intended the law to only stop debtors in possession from assuming *and* assigning a license. *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 493 (1st Cir. 1997); *see also In re Mirant Corp.*, 440 F.3d 238 (5th Cir. 2006).

The circuits' confusion over when to rely on plain language or consider congressional intent has lead to splits as well over federal sentencing statutes. The Second Circuit relied on plain language in 18 U.S.C. § 924(c)(1)(A) (2006) to preclude the issuance of a sentencing enhancement whenever the underlying crime of violence carries a "greater minimum sentence." *United States v. Whitley*, 529 F.3d 150, 156 (2d Cir. 2008). However, the Fourth, Sixth, and Eighth Circuits construed the same statute far differently, inferring Congress' contrary intent to *increase* the length of incarcerations. *See United States v. Studifin*, 240 F.3d 415, 423 (4th Cir. 2001); *United States v. Jolivette*, 257 F.3d 581, 586 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386, 388 (8th Cir. 2000).

A similar split has occurred over whether 8 U.S.C. § 1252(a)(2) (2006) allows judicial review of non-discretionary deportation proceedings. The Seventh Circuit recognized that the "difficulty that has given rise to this disagreement" is the divergence between the statute's plain language, that "places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review," and its purpose. *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (discussing split between Seventh and Second Circuits, and Ninth and Sixth Circuits); *see also Chen v. U.S. Dep't of Justice*, 434 F.3d 144, 151-55 (2d Cir. 2006); *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006);

Santana-Albarran v. Ashcroft, 393 F.3d 699, 705 (6th Cir. 2005).

The lower courts need guidance interpreting statutes where plain language and legislative intent appear at odds. The Illinois Supreme Court's misconstruction of the PLCAA raises a particularly urgent and nationally important case resulting from this confusion, and one likely to recur nationwide.

The Illinois court reached its decision that Petitioners' case must be dismissed by relying exclusively on a purported plain language definition of an undefined statutory term – "volitional." In that court's view, a 13-year-old's playful firing of a gun he thought was unloaded, was a discharge "caused by a volitional act that constituted a criminal offense," App. 42a, and hence, preempted by the PLCAA. *Id.* Yet, for purposes of this federal statute, congressional intent properly defines what constitutes a volitional, criminal offense, not state law or consultation with a dictionary. As this Court's preemption jurisprudence makes plain, Congress' stated intent to only bar "novel" actions "solely caused" by criminal acts, 15 U.S.C. § 7901(a)(7), § 7901(b)(1), suggests that "volitional" requires some substantial degree of criminal intent, not just affirmative conduct. In fact, Congress expressed no concern for actions brought by individual victims of defective products, which it exempted from the PLCAA's immediate-dismissal requirement.

Instead, legislative history confirms that the Illinois court's interpretation is directly contrary to congressional intent. The PLCAA's chief sponsor and floor leader in the Senate stated that under the product liability section:

> [E]ven if [a] person who discharged a defective product was technically in violation of some law relating to possession of the product, that alone would not bar [a] lawsuit. For instance, if a juvenile were target shooting without written permission from his parents – that is a violation of current law, a violation of 18 U.S.C. 922(y) – and was injured by defective ammunition, the juvenile would still be able to bring a suit against the ammunition manufacturer.

151 Cong. Rec. S9087, S9100 (Sen. Craig) (July 27, 2005.

Thus, while the PLCAA's chief Senate sponsor stated that an action could be brought where a child unlawfully and intentionally pulls a trigger, under the Illinois court's reading of the PLCAA all such actions would be barred, for that court would deem the discharge a volitional act that was a criminal offense. Under that reasoning, Illinois courts could not impose liability on the manufacturer even if it made its gun with an indicator that erroneously read "UNLOADED. WILL NOT FIRE," when the opposite was true, for a child who pulled the trigger would be acting "volitionally" and unlawfully.

If this decision remains unreviewed, courts will interpret the PLCAA to intrude deeply into traditional state authority over the liability of manufacturers for defective firearms, with broad consequences for liability and compensation. In any given year more than 16,000 people in the United States are unintentionally shot, more than 3,000 of

whom are 19 or younger.[7] Researchers have found that as many as half of deaths from accidental shootings could be prevented if certain safety devices were implemented in guns.[8] Indeed, Petitioners' 13-year-old son would not have been killed had Respondent simply included a $10 safety feature invented more than a century ago. Given the dangers posed by defective guns, the applicability of the PLCAA to state products liability actions is an issue of great national importance that warrants this Court's review.

C. The Illinois Court's Approach to Construction of Key Terms in the PLCAA Conflicts with that of Other Courts

In relying on a dictionary definition of "volitional," App. 42a, the Illinois court took a tack at odds with other courts. The United States Court of Appeals for the Ninth Circuit, for example, interpreted "volitional" acts as those that intend harm. *See United States v. Trinidad-Aquino*, 259 F.3d 1140, 1144-45 (9th Cir. 2001) (driving under the influence of alcohol was not a "crime of violence"

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[7] CDC National Center for Injury Prevention and Control, Web-based Injury Statistics Query and Reporting System (2006 (deaths) and 2007 (injuries), most recent year available), http://www.cdc.gov/ncipc/wisqars/. Calculations by Brady Center to Prevent Gun Violence (May 5, 2009).

[8] Jon S. Vernick *et al.*, *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 INJ. PREV. 307, 308 (2003). *See also* R. Ismach *et al.*, *Unintended Shootings in a Large Metropolitan Area: An Incident-Based Analysis*, 41 ANNALS OF EMERGENCY MED. 10-17 (2003); U.S. General Accounting Office, *Accidental Shootings: Many Deaths and Injuries Caused by Firearms Could be Prevented* 1-47 (1991).

under federal law, since the defendant was "without some volition to perform the act," as he did not intend to injure another).

The Illinois Supreme Court's interpretative dilemma concerning the PLCAA mirrors those of other courts faced with construing other provisions of that statute. *See e.g.*, *Ileto v. Glock Inc.*, 565 F.3d 1126, 1134 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 431 (Ind. Ct. App. 2007), *transfer denied by*, *Smith & Wesson Corp. v. City of Gary*, 2009 Ind. LEXIS 12 (Ind. Jan. 12, 2009) (table).

The constructional dilemma faced by the lower courts requires this Court's authoritative determination to resolve the conflict in the courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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APPENDIX A: Opinion of the Illinois Supreme Court (Mar. 19, 2009) 1a

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APPENDIX A
Opinion of the Illinois Supreme Court
(Mar. 19, 2009)

Supreme Court of Illinois.

Hector ADAMES, JR., et al., Appellees and Cross-Appellants,

v.

Michael F. SHEAHAN, in His Official Capacity as Cook County Sheriff, Appellant and Cross-Appellee.
Hector Adames, Jr., et al., Appellees and Cross-Appellants,

v.

Beretta U.S.A. Corporation, Appellants and Cross-Appellees.

Nos. 105789, 105851.
909 N.E.2d 742 (Ill. 2009)

March 19, 2009.
Rehearing Denied May 26, 2009.

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***745 OPINION**

Justice THOMAS delivered the judgment of the court, with opinion.

On May 5, 2001, William (Billy) Swan accidentally shot and killed his friend Joshua (Josh) Adames while playing with his father's service weapon. At the time, Billy's father, David Swan, was employed by the Cook County sheriff's department as a correctional officer. Plaintiffs, Hector Adames, Jr., and Rosalia Diaz, as co-special administrators of the estate of Josh Adames, filed suit against numerous defendants. At issue in this case are plaintiffs' claims against defendant Michael F. Sheahan (Sheahan), in his official capacity as Cook County sheriff, and defendant Beretta U.S.A. Corporation (Beretta).

Following discovery, the trial court granted summary judgment in favor of defendants Sheahan and Beretta on their respective motions for summary judgment. The appellate court affirmed in part and reversed in part, and remanded the cause. 378 Ill.App.3d 502, 316 Ill.Dec. 823, 880 N.E.2d 559. Both Sheahan and Beretta filed petitions for leave to

appeal. 210 Ill.2d R. 315(a). This court allowed both petitions and consolidated the cases. Plaintiffs also have filed a cross-appeal. 155 Ill.2d R. 318.

BACKGROUND

Numerous depositions were taken during discovery in this case. The evidence from those depositions will be summarized here as necessary to our disposition of the case.

Billy Swan's Testimony

On the morning of May 5, 2001, Billy Swan, who then was 13 years old, was home alone. Billy's mother was at work and his father, David, had taken Billy's brother to a movie. Billy called his friend Josh Adames and invited him over to play. Billy then went to his parents' bedroom to watch for Josh through the bedroom window. Billy knew that both going into his parents' bedroom and inviting friends over when no one else was home were against house rules.

While in his parents' bedroom, Billy noticed that the closet door was partially open. He saw a box on the top shelf of the closet, so he took the box down to see what was inside. Billy opened the box, which he said was unlocked, and saw three guns. One of the guns was a Beretta 92FS handgun, the gun at issue in this case. Billy had never seen his father carry a gun or clean a gun in the house, although he thought that his father might have a gun. Billy had never handled a gun before.

Billy picked up each gun and examined it. Billy said that the magazine or clip was in the Beretta. When

Billy picked up the Beretta, he pushed a button that released the magazine. Billy could see the bullets in the magazine. Billy then put the magazine back in the Beretta. Billy moved the slide at the top of the gun and a bullet popped out. Billy again removed the magazine and put the bullet back in the magazine. Billy repeatedly removed and replaced the bullets and magazine from the gun. Billy knew that the Beretta was loaded when the magazine was in the gun, but thought it was unloaded when the magazine was taken out. He thought that the bullet came out of the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber. Billy did not read the instruction manual for the Beretta.

After playing with the guns for several minutes, Billy saw his friend Michael riding his bike outside. Billy put the three guns in his pockets and went downstairs and opened the front door. Billy invited Michael in and showed him the guns. Billy jokingly told Michael that he was feeling ***746** "trigger happy" and that he was going to shoot Josh. Billy left the guns on the couch while he and Michael went in another room to play on the computer. Approximately 10 minutes later, Josh came over. Billy showed Josh the guns and the boys began playing around. While Billy was holding the Beretta, Josh tried to reach for it to take it out of Billy's hand. Billy pushed the button on the Beretta, took the magazine out and put it in his pocket. At this point, Josh was by the front door. Billy pretended that he was firing the gun, then pulled the trigger, discharging the gun. The gunshot was loud, causing Billy's ears to ring. Billy was afraid he would be in trouble if the neighbors heard the noise, so he ran upstairs and put the guns away.

When Billy came back downstairs, he saw Josh sitting against the door holding his stomach. Josh told Billy that he had been shot. Billy first thought that Josh was kidding, but when he moved Josh's hand, he saw a hole. Billy called 911 and told the dispatcher that he had found a gun and accidentally shot his friend while playing. Billy testified that he knew he was handling a real firearm and real ammunition when he shot Josh. Michael left as soon as the shooting happened.

Billy was found delinquent in juvenile court proceedings for the shooting and was placed on probation. The delinquency determination was based on a finding that Billy committed involuntary manslaughter (720 ILCS 5/9-3(a) (West 2000)), and reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2000)). The appellate court affirmed the delinquency finding. *In re W.S.*, No. 1-02-1170, 343 Ill.App.3d 1300, 305 Ill.Dec. 890, 856 N.E.2d 695 (2003) (unpublished order under Supreme Court Rule 23).

David Swan's Testimony

David Swan graduated from the police academy in 1988 and was deputized with the Cook County sheriff's department around January 1988. From 1988 through 1997 or 1998, David worked corrections inside the Cook County jail, working a tier with approximately 48 to 60 inmates. David fed the inmates and did paper work and log books. David was promoted to a lieutenant in 1997 or 1998. As lieutenant, David's position was mainly administrative, doing paper work and scheduling and filling shifts. Until David was promoted to lieutenant, he carried a firearm to and from work most of the time, although he did not carry his gun while working on the jail tier.

Rather, he would store his gun in the Division 5 Armory. He initially carried a Smith & Wesson .38 Special, but when he became certified in automatic weaponry, he began carrying the Beretta 92FS and kept the .38 Special as his personal weapon. David stopped carrying a weapon to work when he became a lieutenant. David testified that in 2001, he did not need a weapon in order to perform his job duties.

At the time of the shooting, David owned three firearms, the .38 Special, a .25 semiautomatic and the Beretta 92FS. The .25 semiautomatic was David's personal weapon and was never carried on the job. Although David no longer carried a gun once he was promoted to lieutenant, David kept his guns for his own protection and in case he was transferred to a different unit of the Cook County sheriff's office where he would again need a firearm. David's understanding was that, as a correctional officer, he was not required to respond to a crime by attempting to physically introduce himself into the crime or stop the crime. Rather, David understood that he was to call "911" to request a police response ***747** in the event he witnessed criminal activity.

On May 5, 2001, David took his younger son to the movies while his wife was at work. Billy did not want to go to the movie. David told Billy that no one was allowed in the house. Billy said that he was going to the park to play. David testified that prior to May 5, 2001, the last time he had seen his guns was in the summer of 2000, when he completed his annual certification at the Cook County sheriff's gun range. After qualifying with the weapons, David cleaned them and locked them in his lockbox. David placed the lockbox with the guns in it on the top shelf of his bedroom closet. There were two keys to the lockbox.

David kept one key on his key ring and one key in his top dresser drawer. David disagreed with Billy's testimony that the lockbox was not locked; however, for purposes of summary judgment, it was presumed that the lockbox was unlocked.

David understood that the sheriff's department required deputies to secure and store their weapons in either a locking box, like the one David used, or with a trigger lock. David testified that he stored the ammunition separately from the handgun, and stored the handgun without a bullet in its chamber, in accordance with department requirements. David was not aware that the Beretta would fire a bullet if the magazine was removed.

Following the shooting, Sheahan filed a complaint against David before the Cook County sheriff's merit board. The complaint alleged that each officer has a duty to safely store his weapon, that David did not do that, and that this failure allowed David's son to gain access to the weapon, which in turn resulted in Josh's death. The complaint noted that Sheahan's general order required the safe storage of weapons to avoid accidents. David's guns were taken from him by the police in the investigation and were never returned to him, although David was able to continue to work for the Cook County sheriff's office as a correctional officer after serving a suspension.

David also was charged pursuant to section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2000)), which prohibits improper storage of a firearm in a premise in which a minor under the age of 14 is likely to gain access to the firearm. David was found not guilty of the criminal charges.

Sheahan's Office Rules and Policies

Sheahan's executive director and weapons training officers testified concerning Sheahan's orders and training instructions. Those orders and training instructions required all weapons to be locked up when stored at home. Weapons must be stored so they are inaccessible to children, and officers are taught to expect their children to look everywhere in their homes. At the time of Josh's shooting, Sheahan had a general order in place that mirrored or exceeded the requirements of section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2000)). The general order required officers to secure their duty weapons in a secured lockbox container or other location that would prohibit access by unauthorized persons, and to store keys to such lockboxes in a separate secure location. Sheahan's training also included materials on educating family members, particularly children, about gun safety. Officers are required to qualify in firearms annually, even if they do not own a weapon. Recertification included a program on home firearm safety.

Gerald O'Sullivan, retired executive director of the Cook County sheriff's office's training program, testified that Cook County Sheriff's Office correctional officers do not need a weapon to perform *748 their duties. O'Sullivan said that only court deputies and sheriff's police officers need a weapon. The only authorized purpose for a correctional officer's duty firearm would be for external operations outside the jails. All sheriff's deputies receive training to use their firearms, but it is a police officer that responds to an emergency on the street. Cook County sheriff's correctional officers are trained that unless someone's life is in danger, they are to call "911." Correc-

tional officers never carry their duty weapons when they are at the jails, and do not have the responsibility to be ready to use their firearm to protect a person's life if it is in danger.

Similarly, Cook County sheriff's office retired Training Academy Chief Michael Ryan testified that correctional officers are not required to carry their weapons when they are off duty. Correctional officers are trained to call "911" and not to get involved in criminal situations, although Ryan testified that officers do have a duty to respond to forcible felonies occurring in their presence while off duty. In such a situation, a correctional officer would be permitted to use his duty firearm. Ryan further testified that when a correctional officer is at home, he is not expected to respond to crimes and is not required to keep his weapon available to him at all times when he is off duty. In fact, correctional officers are not required to own weapons.

Leroy Marcianik, range master of the firearms training division of the Cook County sheriff's department, testified that all sworn officers in Sheahan's office are required to be recertified in firearms on an annual basis. The officers are required to have a firearm that they can use in their annual recertification process. The process of recertification includes instruction on shooting, as well as issues concerning the safe storage of duty firearms. Officers that carry their firearms on a daily basis include the sheriff's police and some of the court services officers. Sheriff's correctional officers do not have to carry a weapon while on duty, nor do they have to carry a weapon when off duty.

The Beretta 92FS

The Beretta 92FS is a semiautomatic nine-millimeter pistol. The instruction manual for the Beretta states that "[t]he Beretta 92FS semiautomatic pistol is primarily designed as a personal defense firearm for military and police use," and that "[i]t has become the choice of military and police forces throughout the world." The manual lists the Beretta's safety features, including: an ambidextrous safety-decocking lever; a firing pin unit; a hammer drop catch; an automatic firing pin catch; a chamber-loaded indicator, and a slide overtravel stop. The manual repeatedly cautions users to keep fingers off the trigger until ready to fire and to make sure the muzzle is pointing in a safe direction. The manual also warns that to prevent accidents due to wrongful unloading practice, the user should remember to remove the magazine and clear the chamber.

Expert Testimony

Plaintiffs presented experts in their case against Beretta to testify that the Beretta 92FS was unreasonably dangerous. Stanton Berg, a firearms consultant, testified that a magazine disconnect device would have prevented the shooting in this case. The magazine disconnect was invented in 1910 and disables a semiautomatic pistol from firing when the magazine is removed. Berg testified that Beretta produced and sold Beretta 92 Series handguns with a magazine disconnect for use by police departments such as the Royal Canadian Mounted Police, the United States Veterans Administration and the correctional department of New York City. Berg noted *749 more than 300 other models of handguns that incorporate a magazine disconnect safety, and testi-

fied that, in his opinion, any handgun without a magazine disconnect is defective. In addition, Berg testified that, in the absence of a magazine disconnect, the Beretta required a good chamber-loaded indicator. Berg said that the chamber-loaded indicator on the Beretta 92FS was not sufficient to warn a user that the chamber had a bullet in it because the user could hardly see the indicator. Berg also believed that the Beretta required a warning on the weapon stating that it was capable of being fired with the magazine removed.

Wallace Collins, a firearms and ammunition design and safety expert, also testified on behalf of plaintiffs that the Beretta was unnecessarily dangerous. Collins stated that the Beretta required a magazine disconnect safety; a warning that the gun would fire when the magazine was removed; a marking to make plain what the chamber-loaded indicator means; a chamber-loaded indicator in an optimum position; and a key lock. Collins testified that the chamber-loaded indicator on the Beretta was not well designed. Collins said that the safety features required were readily available, inexpensive, and commercially feasible.

Professor Stephen Teret testified on behalf of plaintiffs as an expert in injury epidemiology. Teret was a professor of epidemiology for the School of Public Health at Johns Hopkins University. Teret testified concerning a survey designed by the Johns Hopkins Center for Gun Policy and Research, reported in the Journal of Public Health Policy. The survey asked respondents whether they thought that a pistol can be shot when the magazine is removed. Out of 1,200 respondents, 65% said that the pistol could be fired if the magazine was removed, 20.3% thought that a

pistol could not be discharged after the magazine was removed, 14.5% did not know, and 0.2% refused to answer. Of those that answered either that the pistol could not be discharged after the magazine was removed or that they did not know, 28% lived in a gun-owning household. Teret testified that the absence of a magazine disconnect caused Josh's shooting. Teret further testified that the chamber-loaded warning on the Beretta was not effective. Teret's opinion was that the chamber-loaded warning did not convey that the handgun was loaded.

Beretta's witnesses testified that Beretta has manufactured handguns with magazine disconnects, which adds at most $10 to the $500 price of the gun. Beretta's witnesses agreed that the shooting in this case would not have happened if a magazine disconnect safety had been installed on the gun. Beretta did not include a magazine disconnect safety feature on the Beretta 92FS because there was no market demand for that feature. Beretta's witnesses also testified that for the past 20 years, the vast majority of law enforcement agencies have consistently expressed a preference for no magazine disconnect safety or internal locking device. Law enforcement officers and agencies do not want weapons that may become inoperable by an inadvertent release of the magazine, which could possibly jeopardize the safety of officers and the public.

The Complaint and Summary Judgment

With regard to Sheahan, plaintiffs' third amended complaint contained a wrongful-death claim and a survival claim. Plaintiffs alleged that Sheahan assumed and exercised control over David Swan as Sheahan's employee and servant with regard to the

safe and secure handling and storage of David's duty firearm and ammunition. Plaintiffs alleged, *inter alia,* that David Swan negligently stored his firearm, *750 as well as his ammunition, in a manner that allowed his 13-year-old son to gain access to it; negligently failed to store his firearm in a separate location from the ammunition; negligently failed to childproof the firearm by securing it with a locking device; negligently failed to lock the container in which he stored his firearms; and negligently provided insufficient, as well as inappropriate, firearm instruction to Billy.

Plaintiffs alleged that, as a result of one or more of David's negligent acts, Billy accessed David's firearm and bullets, and used the firearm to shoot and kill Josh. In addition, the wrongful death of Josh was proximately caused by David's negligence in the course of his employment as a deputy Cook County sheriff, while motivated to serve Sheahan's interests and the terms of David's employment. Plaintiffs asserted that Sheahan was vicariously liable for David's negligent acts and/or omissions in the scope of his employment as an officer of the Cook County sheriff's office, both at common law and pursuant to statute.

Sheahan moved for summary judgment on the ground that the shooting did not occur within the course and scope of David's employment as a Department of Corrections officer, that Sheahan owed no duty to Josh, and that the storage of the gun was at most a condition and not the cause of the shooting. In the alternative, Sheahan argued that if the court determined that David's storage of the gun was within the course and scope of David's employment, Sheahan was immune from suit pursuant to sections

2-109, 2-201, and 2-204 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-109, 2-201, 2-204 (West 2000)).

In addressing Sheahan's motion for summary judgment, the trial court held that Sheahan's arguments concerning weapon storage and scope of employment presented questions of fact sufficient to preclude summary judgment. However, the trial court found that the issue of whether Sheahan owed a duty to protect Josh from the criminal acts of Billy was dispositive. The trial court noted that Billy had been convicted of involuntary manslaughter and reckless discharge of a firearm, and had been adjudicated a delinquent minor. Citing *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill.2d 496, 117 Ill.Dec. 47, 520 N.E.2d 37 (1988), the trial court noted that Illinois law does not impose a duty to protect another from a criminal attack by a third person unless the criminal attack is reasonably foreseeable and the parties have a special relationship. The trial court held that Sheahan and Josh had no special relationship that would impose a duty on Sheahan to protect Josh from Billy's criminal act. The trial court further held that even if Sheahan, through his agent David Swan, owed a duty to Josh, there was no proximate cause because the cause of harm to Josh was not reasonably foreseeable. The trial court therefore entered summary judgment in favor of Sheahan.

With regard to Beretta, plaintiffs' third amended complaint contained claims for product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. Specifically, plaintiffs alleged that the Beretta was inherently dangerous and defective because it did not incorporate safety features, including: a magazine

disconnect safety that would prevent the gun from being fired if the magazine is removed; an effective chamber-loaded indicator to make users aware of when a bullet is loaded into the gun's chamber; and other safety devices such as a built-in lock, a child-resistant manual safety, a grip safety, and personalized*751 gun technology that would have prevented unauthorized users, such as children, from firing the gun.

Plaintiffs also alleged that the gun was defective because it did not include adequate warnings concerning the foreseeable use of the gun by unauthorized persons, including children. Plaintiffs asserted that the defects included a failure to warn that: the gun may be loaded and can be fired even if the magazine is empty or disconnected from the gun; that the gun is loaded when there is red showing on the extractor; that the gun is loaded when the extractor is protruding; that the gun can be fired by children and other unauthorized users; that the gun automatically loads bullet cartridges into the gun's chamber after being fired or after the gun is released from a lockback position; and that the gun should not be used or stored without additional safety devices.

In its summary judgment motion, Beretta argued that its product was not unreasonably dangerous, and that the Beretta 92FS performed as safely as ordinary consumers of firearms would expect. Beretta also argued that it had no duty to warn because the dangers of pointing a firearm at another human being and pulling the trigger are open and obvious. Finally, Beretta contended that Billy's actions were an intervening and superceding cause.

The trial court granted Beretta's motion in its en-

tirety, "based upon the record" and "for all the reasons stated by Defendant Beretta and all relevant law."

The Appellate Court

Plaintiffs then appealed the trial court's orders. The appellate court affirmed in part and reversed in part. 378 Ill.App.3d 502, 316 Ill.Dec. 823, 880 N.E.2d 559. With regard to Sheahan, plaintiffs argued that the trial court erred in finding that Sheahan owed no duty to Josh, and in finding that Billy's conduct was criminal and was an independent intervening cause of Josh's injury. Plaintiffs argued that because the trial court relied on its finding that Billy's actions were criminal, it failed to examine the proper factors to determine whether one party owes a duty to another. Plaintiffs further argued that the trial court erred in finding that a criminal attack even occurred, as the testimony established that the shooting was an accident.

In addressing plaintiffs' arguments, the appellate court stated that because plaintiffs sought damages against Sheahan based on the principle of *respondeat superior*, it would address scope of employment, even though the trial court denied Sheahan's motion on that issue. 378 Ill.App.3d at 515, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court found that the facts in this case were similar to the facts in *Gaffney v. City of Chicago*, 302 Ill.App.3d 41, 236 Ill.Dec. 40, 706 N.E.2d 914 (1998), so that *Gaffney* was controlling. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. Based upon *Gaffney*, the appellate court found that the facts supported a finding that David was acting within the scope of his employment, and that Sheahan was liable for David's allegedly tor-

tious acts. 378 Ill.App.3d at 518, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court next considered whether Billy's actions foreclosed a duty on the part of Sheahan to Josh. The appellate court took issue with the trial court's characterization of the proceedings against Billy as a conviction. The appellate court noted that Billy was adjudicated delinquent pursuant to the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 2000)) and that a juvenile adjudication is not a "conviction" as defined under the Criminal Code of 1961 (720 ILCS 5/2-5 (West 2000)). 378 Ill.App.3d at 518, 316 Ill.Dec. 823, 880 N.E.2d 559. Therefore, ***752** Billy was not convicted of a crime. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559. Further, because Billy did not intend to hurt Josh, there was a question of material fact of whether Billy's actions were accidental or reckless. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559. Accordingly, the appellate court held that the trial court erred in finding that Billy's actions were a criminal attack that foreclosed Sheahan's duty to Josh. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court also disagreed with the trial court's finding that this incident was not reasonably foreseeable for purposes of summary judgment. 378 Ill.App.3d at 519, 316 Ill.Dec. 823, 880 N.E.2d 559. The court based its finding on the fact that David stored his Beretta next to ammunition in an unlocked storage case, in an unlocked closet accessible to a 13-year-old boy. The court also noted the evidence concerning Sheahan's awareness of these types of incidents. Moreover, there was sufficient evidence in the record to establish the additional duty factors

of the likelihood of injury, the magnitude of the burden to guard against the injury, or the consequences of imposing that burden. 378 Ill.App.3d at 520, 316 Ill.Dec. 823, 880 N.E.2d 559.

Finally, the appellate court noted that Sheahan had raised sections 2-109, 2-201 and 2-204 of the Tort Immunity Act (745 ILCS 10/2-109, 2-201, 2-204 (West 2000)) as affirmative defenses to the complaint. The appellate court noted that the trial court did not address the tort immunity issue, and in remanding, stated that its finding that Sheahan was liable under the doctrine of *respondeat superior* did not end the immunity analysis, as the existence of a duty and the existence of an immunity are distinct issues that must be analyzed separately. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559.

With regard to Beretta, the appellate court similarly held that the trial court erred in finding that Billy's actions were an independent intervening cause that superseded Beretta's legal responsibility. 378 Ill.App.3d at 523, 316 Ill.Dec. 823, 880 N.E.2d 559. Rather, proximate cause in fact was shown because the shooting would not have occurred if the handgun had been properly stored, and it was reasonably foreseeable that this type of harm would occur if the handgun was not properly stored. 378 Ill.App.3d at 523, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court did affirm the trial court's finding that the Beretta was not unreasonably dangerous or defectively designed under both the consumer expectation test and the risk-utility test for product liability claims. 378 Ill.App.3d at 526, 528, 316 Ill.Dec. 823, 880 N.E.2d 559. However, the appellate court reversed the trial court's finding that Beretta did not have a duty to warn. The appellate court held that

plaintiffs' failure to warn claim presented a question of fact sufficient to survive summary judgment. 378 Ill.App.3d at 530, 316 Ill.Dec. 823, 880 N.E.2d 559.

Finally, the appellate court addressed Beretta's argument that plaintiffs' lawsuit against it should be dismissed pursuant to the recently enacted Protection of Lawful Commerce in Arms Act (PLCAA or the Act) (15 U.S.C. §§ 7901 through 7903 (2006)). The appellate court noted that, pursuant to the PLCAA, plaintiffs must show that they fall within the exceptions to the Act in order to avoid its provisions. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court held that plaintiffs failed to show that their claims fell within the PLCAA's exceptions for negligent entrustment or negligence *per se*, and for breach of contract or warranty. ***753**378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court held that the only exception that applied in this case is the exception for claims alleging a defect in design or manufacturing, absent a volitional criminal act. 378 Ill.App.3d at 533-34, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court stated that whether Billy's actions were criminal or unlawful was a question of fact for the trier of fact. If Billy's actions were found to be criminal, the PLCAA would foreclose plaintiffs' claims against Beretta. However, if Billy's actions were found to be purely accidental, the section 7903(5)(A)(v) exception to the PLCAA would apply and the PLCAA would not preclude plaintiffs' claims against Beretta. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559.

ANALYSIS

This case comes before us on the grant of summary judgment in favor of defendants. The purpose of

summary judgment is to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 42-43, 284 Ill.Dec. 302, 809 N.E.2d 1248 (2004). Summary judgment is proper only where "the pleadings, depositions, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2000). In determining whether a genuine issue of material fact exists, the pleadings, depositions, admissions and affidavits must be construed strictly against the movant and liberally in favor of the opponent. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248. This court reviews an order granting summary judgment *de novo*. *Adams*, 211 Ill.2d at 43, 284 Ill.Dec. 302, 809 N.E.2d 1248.

Sheahan's Appeal

Sheahan argues that the trial court properly granted summary judgment in his favor because he had no duty to protect Josh from a criminal attack. Sheahan contends that no special relationship existed between Sheahan and Josh that would give rise to a common law duty to warn or protect Josh from harm. Moreover, Sheahan did not voluntarily undertake to pro-

tect Josh from third-party criminal attacks, which would fit within the exception to the special relationship rule.

Sheahan also argues that the appellate court's decision extends *respondeat superior* liability to unreasonable and impermissible bounds. Sheahan maintains that David was not acting within the scope of his employment at the time that he stored the Beretta.

Finally, Sheahan argues that summary judgment in his favor also is warranted because the manner in which David's Beretta was stored was not the proximate cause of Josh's shooting. Rather, the manner in which the Beretta was stored merely furnished a condition that made the shooting possible.

In response, plaintiffs deny that their claim involves special relationships or preventing criminal attacks. In fact, plaintiffs argue that there was no criminal attack in this case, because Billy did not intend to *754 shoot or harm anyone, and was not convicted of a criminal offense, but was only adjudicated delinquent. Plaintiffs also deny that they alleged a voluntary undertaking. Rather, plaintiffs' allegations of duty are premised on common law and statutory grounds. Plaintiffs claim that Sheahan owed a duty under common law and statute to secure the handgun. Further, plaintiffs contend that the shooting in this case was foreseeable.

With regard to *respondeat superior*, plaintiffs argue that the issue is not properly before this court because it was not an issue in the appellate court. Although the appellate court addressed scope of employment, plaintiffs assert that because scope of em-

ployment was not at issue, that portion of the opinion was *dicta.* Assuming, *arguendo,* the issue is properly before this court, plaintiffs contend that David was acting within the scope of his employment. Plaintiffs note that Sheahan required David to keep his weapon secured at home, which demonstrates that Sheahan controlled David's use of the Beretta during off-duty hours. Further, Sheahan could regulate David's storage of the weapon only if David was acting within the scope of his employment. In addition, the fact that Sheahan filed charges against David before the Cook County sheriff's merit board, alleging a violation of the sheriff's rules concerning weapon storage, establishes that David was acting within the scope of his employment. Plaintiffs maintain that Sheahan would have no authority to discipline David if David was not acting in the scope of his employment.

We first address plaintiffs' claim that the issue of *respondeat superior* is not properly before this court. It is well settled that when the appellate court reverses the trial court, and the appellee in the appellate court brings the case to this court for further review, that party may raise any questions properly presented by the record to sustain the judgment of the trial court, even if those questions were not raised or argued in the appellate court. *In re R.L.S.*, 218 Ill.2d 428, 437, 300 Ill.Dec. 350, 844 N.E.2d 22 (2006). In Sheahan's motion for summary judgment in the trial court, in addition to raising arguments concerning duty, proximate cause and tort immunity, Sheahan argued that he was entitled to summary judgment because the shooting did not occur within the course and scope of David's employment. As noted, the trial court granted summary judgment in favor of Sheahan based on its finding that Sheahan owed no duty

to Josh. Plaintiffs then appealed that finding. In addressing the trial court's finding that Sheahan owed no duty to Josh, the appellate court addressed the issue of *respondeat superior*. Sheahan then raised the issue of *respondeat superior* in his petition for leave to appeal and brief in this court. Accordingly, it is clear that the issue of *respondeat superior* is properly before this court.

We next address the merits of the appellate court's finding that David was acting within the scope of his employment when he stored his weapon, as a finding that David was not acting within the scope of his employment would be dispositive. In general, a person injured by the negligence of another must seek his remedy from the person who caused his injury. *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 163, 308 Ill.Dec. 782, 862 N.E.2d 985 (2007). However, the relationship of employer and employee sets forth an exception to the general rule. *Bagent*, 224 Ill.2d at 163, 308 Ill.Dec. 782, 862 N.E.2d 985. Pursuant to the theory of *respondeat superior*, an employer can be liable for the torts of his employee when those torts are committed within the scope of the employment. ***755***Bagent*, 224 Ill.2d at 163, 308 Ill.Dec. 782, 862 N.E.2d 985. Under *respondeat superior*, an employer's vicarious liability extends to the negligent, willful, malicious or even criminal acts of its employees, when those acts are committed within the scope of employment. *Bagent*, 224 Ill.2d at 163-64, 308 Ill.Dec. 782, 862 N.E.2d 985.

Illinois courts look to the Second Restatement of Agency (the Restatement) for guidance in determining whether an employee's acts are within the scope of employment. *Bagent*, 224 Ill.2d at 164, 308 Ill.Dec. 782, 862 N.E.2d 985. The Restatement identifies

three general criteria used in determining whether an employee's acts are within the scope of employment. The Restatement provides:

> "(1) Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master* * *[.]
>
> * * *
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228 (1958).

This court has held that all three criteria of section 228 must be met in order to conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. It is plaintiff's burden to show the contemporaneous relationship between the tortious act and the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985.

With regard to the scope of employment issue, the appellate court held that this case was controlled by its decision in *Gaffney v. City of Chicago*, 302 Ill.App.3d 41, 236 Ill.Dec. 40, 706 N.E.2d 914 (1998),

and, therefore, that David was acting within the scope of his employment. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. In *Gaffney*, a patrolman employed by the Chicago police department came home from work, unloaded his revolver, and placed the revolver and the bullets in an unlocked metal cabinet near the stairway leading to his basement. *Gaffney*, 302 Ill.App.3d at 44, 236 Ill.Dec. 40, 706 N.E.2d 914. The officer's minor son later took the revolver and bullets to a party, and shot and killed a boy. *Gaffney*, 302 Ill.App.3d at 44, 236 Ill.Dec. 40, 706 N.E.2d 914. The plaintiff sued the officer for negligent storage of his weapon, and sued the City of Chicago under a *respondeat superior* theory. *Gaffney*, 302 Ill.App.3d at 43, 236 Ill.Dec. 40, 706 N.E.2d 914. A jury found both defendants liable, and in answer to a special interrogatory, found that the officer was acting within the scope of his employment when he stored the weapon. *Gaffney*, 302 Ill.App.3d at 43, 236 Ill.Dec. 40, 706 N.E.2d 914. The circuit court granted the City's motion for judgment notwithstanding the verdict on the ground that the officer was not acting within the scope of his employment at the time he stored the gun at his home. *Gaffney*, 302 Ill.App.3d at 43-44, 236 Ill.Dec. 40, 706 N.E.2d 914.

On appeal, the appellate court reversed. The appellate court noted that the officer had testified that he was required to own a gun; that he would not be allowed to report for work if he did not have a gun; and that he brought his guns and bullets home every day because the police department did not provide him with a locker in which to store his weapon at work. ***756***Gaffney*, 302 Ill.App.3d at 46, 236 Ill.Dec. 40, 706 N.E.2d 914. The officer also testified that he did not lock the cabinet or the gun because his life had been threatened several times and " 'because I'm a

Chicago police officer. If I heard someone screaming, would I have time to get that gun, I don't know. Would I attempt to, hopefully.' " *Gaffney*, 302 Ill.App.3d at 46, 236 Ill.Dec. 40, 706 N.E.2d 914. In addition, the officer stated that as a Chicago police officer, he was required to respond to emergencies at all times, even if not on duty, and that he sometimes might need a gun to respond effectively to an emergency if he had it readily available. *Gaffney*, 302 Ill.App.3d at 46, 236 Ill.Dec. 40, 706 N.E.2d 914.

With regard to the three criteria set forth in the Restatement, the appellate court held that the officer's storage of the gun at home was incidental to the requirement of his employment that he respond to any emergency that occurs in his presence. *Gaffney*, 302 Ill.App.3d at 51, 236 Ill.Dec. 40, 706 N.E.2d 914. The appellate court acknowledged that normally at-home storage of one's personal effects would likely be considered an act of a personal nature, but in this case the police department both trained its officers in off-duty weapon storage and could discipline officers for improper safeguarding of weapons while off duty. *Gaffney*, 302 Ill.App.3d at 52, 236 Ill.Dec. 40, 706 N.E.2d 914.

The appellate court next held that the officer's conduct occurred substantially within the authorized time and space limits of the employment, although the appellate court also concluded that "the fact that conduct occurred outside the time and space limits is not dispositive." *Gaffney*, 302 Ill.App.3d at 52, 236 Ill.Dec. 40, 706 N.E.2d 914. The appellate court recognized that the officer was off duty when he stored his weapon, but noted that with respect to emergencies, the officer was "on call" 24 hours a day. *Gaffney*, 302 Ill.App.3d at 53, 236 Ill.Dec. 40, 706 N.E.2d 914.

Therefore, it was not unreasonable to conclude that the time and space of the officer's employment [illegible] unlimited with respect to actions incidental to his response to an emergency. *Gaffney*, 302 Ill.App.3d at 53, 236 Ill.Dec. 40, 706 N.E.2d 914.

Finally, the appellate court held that the officer's conduct was motivated, at least in part, by a desire to serve his employer. The appellate court based its finding on the fact that one of the reasons the officer kept the gun and cabinet unlocked was because he might need it in the event of an emergency. *Gaffney*, 302 Ill.App.3d at 54, 236 Ill.Dec. 40, 706 N.E.2d 914. Further, the fact that the officer stored the gun in contravention of the police department's recommendations did not establish that the storage was outside the scope of employment. *Gaffney*, 302 Ill.App.3d at 55, 236 Ill.Dec. 40, 706 N.E.2d 914. The appellate court therefore held that the officer was acting within the scope of his employment when he stored his gun.

Relying on *Gaffney*, the appellate court in this case held that David's storage of the gun was incidental to his employment. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court noted that officers stored their weapons at home and received specific training and materials on proper storage. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. In addition, Sheahan disciplined officers for improper storage. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court acknowledged that David did not carry his weapon to work daily, nor did he store it unlocked in order to respond to any emergency in his presence. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. Nonetheless David testified he owned the firearm because of his

job *757 and was annually certified to use the firearm, as required by Sheahan. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court also held that David was acting within the authorized time and space limits of his employment. 378 Ill.App.3d at 517, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court noted that officers were expected to store their weapons at home and, although David testified that he did not carry his gun to work, he did testify that, at one time, he owned the gun for work purposes. 378 Ill.App.3d at 517-18, 316 Ill.Dec. 823, 880 N.E.2d 559. In addition, David would be required to use the gun in an emergency, was certified annually to use the firearm, and was disciplined by Sheahan for improper storage. 378 Ill.App.3d at 517-18, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court did not discuss whether David's conduct was motivated, at least in part, by a desire to serve his employer. The appellate court concluded that David was acting within the scope of his employment and that Sheahan was liable for David's alleged tortious acts. 378 Ill.App.3d at 518, 316 Ill.Dec. 823, 880 N.E.2d 559.

At the outset we note that the appellate court erred in not addressing whether David's conduct was motivated, at least in part, by a desire to serve his employer. As noted, this court in *Bagent* held that all three criteria must be met to conclude that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. For the same reason, we find that the appellate court in *Gaffney* erred in holding that the second criteria-whether the conduct occurred substantially within the authorized time and space limits of the employment-was relevant but not disposi-

tive. See *Gaffney*, 302 Ill.App.3d at 52, 236 Ill.Dec. 40, 706 N.E.2d 914 ("the fact that conduct occurred outside the time and space limits is not dispositive"). We again emphasize that all three criteria of section 228 must be met in order to find that an employee was acting within the scope of employment.

Turning to the substance of the appellate court's ruling, we find that the appellate court erred in finding that David was acting within the scope of his employment and that Sheahan is liable for David's tortious acts. Contrary to the appellate court's conclusion, this case is factually distinguishable from *Gaffney*.

In contrast to *Gaffney*, David testified that he was not required to own a gun and did not need to carry a gun to work once he was promoted to lieutenant in 1997 or 1998. David testified that he did not get rid of his guns, even though he did not carry a weapon in performing his duties, because he wanted the guns for protection and in case he was transferred to a different position where he would need a weapon. In fact, the last time David had seen or touched the Beretta prior to the May 5, 2001, shooting was in the summer of 2000, when David did his yearly qualification with the sheriff's department at the firing range. David also testified that when he was off duty, he was not required to respond to a crime by attempting to stop the crime himself. Rather, his duty was to call 911 and report the crime to the proper authorities.

Gerald O'Sullivan, Michael Ryan and Leroy Marcianik confirmed that correctional officers are not required to carry a weapon when they are off duty, and in fact do not need a weapon to perform

their duties. Correctional officers also are not required to respond to emergencies when they are off duty, and are not required to keep their weapons available at all times.

Based on the preceding testimony, we find as a matter of law that none of the *758 three general criteria for determining whether an employee's acts are within the scope of employment have been met in this case. With regard to the first criteria, David's negligent storage of his guns was not the kind of conduct David was employed to perform, nor was it incidental to his employment. The appellate court found David's negligent storage of the gun was incidental to his employment because there was testimony that officers stored their guns at home, Sheahan trained officers on proper storage, and Sheahan disciplined officers for improper storage. While these facts might support a finding that David was acting within the scope of his employment if David was required to carry a gun at work like the officer in *Gaffney*, the fact remains that at the time Billy shot Josh, David was not required to, and did not, carry a gun as part of his employment.

The appellate court also found significant David's testimony that he owned the weapon because of his job and that he was annually certified to use the firearm pursuant to Sheahan's requirements. David testified, however, that Cook County sheriff's officers were required to annually qualify with firearms even if they do not own a weapon. Moreover, while it is true that David purchased the Beretta in connection with his job, the Beretta was purchased at a time when David carried a gun back and forth to work every day. David stopped carrying a gun to work when he became a lieutenant in 1997 or 1998. At

that point, David was not required to keep the Beretta for purposes of his employment, but chose to do so. Contrary to the appellate court's finding, none of these facts establish that David's negligent storage of his weapon was in the performance of his employment or incidental to his employment.

For the same reasons, David's negligent storage of the gun was not within the authorized time and space limits of his employment. Unlike the police officer in *Gaffney*, David was not on call 24 hours a day, was not required to respond to emergencies at all times, and was not required to respond to a crime by attempting to stop the crime himself. In contrast to *Gaffney*, David's employment was not unlimited with respect to actions incidental to his response to an emergency. Consequently, even under the most liberal interpretation of the time and space requirement, it is clear that David's negligent storage of the gun in this case was not within the scope of his employment.

Similarly, there is no evidence that David was motivated, at least in part, by a desire to serve his employer when he negligently stored his gun. As noted, the appellate court in this case did not address this factor in its *respondeat superior* analysis. *Gaffney* held that the officer's conduct in negligently storing his weapon was motivated, at least in part, by a desire to serve his employer, because one of the reasons the officer kept the gun and cabinet unlocked was because he might need it in the event of an emergency. *Gaffney*, 302 Ill.App.3d at 54, 236 Ill.Dec. 40, 706 N.E.2d 914. *Gaffney* acknowledged that the officer also testified that he kept the gun and cabinet unlocked in order to protect his family, but noted that the third criteria in the *respondeat superior*

analysis is satisfied as long as the employee is motivated in part by a desire to serve the employee, even if he is also motivated by personal considerations.

Here, in contrast, there was no evidence that David's negligent storage of the gun was motivated, at least in part, by a desire to serve Sheahan. As discussed, David did not keep the Beretta unlocked in order to respond to an emergency. David kept the Beretta, and thus stored the Beretta, for ***759** his own protection and in case he needed it in the future.

Although summary judgment is generally inappropriate when scope of employment is at issue, if no reasonable person could conclude from the evidence that an employee is acting within the course of employment, a court should hold as a matter of law that the employee was not so acting. *Bagent*, 224 Ill.2d at 170-71, 308 Ill.Dec. 782, 862 N.E.2d 985. Here, no reasonable person could conclude from the evidence that David was acting within the scope of his employment when he negligently stored his weapon. Consequently, Sheahan was entitled to summary judgment in his favor on the issue of *respondeat superior*. The appellate court erred in finding that David was acting within the scope of employment and that Sheahan was thereby liable for David's allegedly tortious acts.

Because we find that Sheahan was entitled to summary judgment based upon *respondeat superior*, there is no need to address Sheahan's remaining arguments concerning duty and proximate cause, nor do we need to remand to the trial court for consideration of Sheahan's immunity claims.

Beretta's Appeal

Plaintiffs' claim against Beretta contained counts alleging design defect, failure to warn, and breach of the implied warranty of merchantability. As noted, the trial court granted summary judgment in favor of Beretta on all of plaintiffs' claims. Plaintiffs appealed the dismissal of their design defect and failure to warn claims, arguing that the trial court erred in holding that the handgun was not unreasonably dangerous for failing to include a magazine disconnect, or a sufficient chamber-loaded indicator, and in finding that Beretta had no duty to warn. Plaintiffs also asserted that the trial court erred in finding that Billy's conduct was an independent intervening cause superceding Beretta's legal responsibility.

As noted, the appellate court affirmed in part and reversed in part. The appellate court affirmed the trial court's finding that the Beretta was not unreasonably dangerous or defectively designed. However, the appellate court did find that plaintiffs' failure to warn claim presented a question of fact, so that summary judgment was improperly entered in favor of Beretta on that claim.

The appellate court also addressed whether the PLCAA required dismissal of plaintiffs' lawsuit against Beretta. The PLCAA was enacted on October 26, 2005, two months after the trial court entered summary judgment in favor of defendants, and applied retroactively to prohibit civil suits against manufacturers, importers, distributors, and dealers of firearms or ammunition products, for harms solely caused by the criminal or unlawful misuse of firearm products or ammunition products that function properly as designed and intended. See 15 U.S.C. §§

7901(a)(3), (b)(1), 7902 (2006). The appellate court held that the PLCAA applied to plaintiffs' lawsuit against Beretta, and therefore plaintiffs' cause of action was barred unless the remaining failure to warn claim fit within one of the Act's six exceptions. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559.

The appellate court found that there was a question of fact concerning whether plaintiffs' failure to warn claim fit within the section 7903(5)(A)(v) exception. That exception allows for claims alleging a defect in design or manufacturing absent a volitional criminal act. In so holding, the appellate court rejected plaintiffs' claim that the PLCAA was unconstitutional because it violated the tenth amendment to the United States Constitution (*760U.S. Const., amend. X). 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559.

In this court, Beretta argues that the appellate court erred in finding that Beretta had a duty to warn. Beretta contends that the danger of pointing a gun at another person and pulling the trigger is open and obvious, even if the person pointing the gun mistakenly believes that the gun is not loaded. In addition, the appellate court ignored the fact that Beretta did provide numerous warnings, any one of which would have prevented Josh's shooting if read and heeded. Beretta also argues that the appellate court erred in holding that plaintiffs' failure to warn claim fit within the exception for manufacturing and design defect claims set forth in the PLCAA.

We first address Beretta's claim that the PLCAA bars plaintiffs' sole remaining claim against Beretta. Whether plaintiffs' failure to warn claim is barred by the PLCAA presents a question of statutory interpre-

tation, which is a question of law. Accordingly, our review is *de novo*. *People v. Lucas*, 231 Ill.2d 169, 173-74, 325 Ill.Dec. 239, 897 N.E.2d 778 (2008).

One of the purposes of the PLCAA is:

> "To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." 15 U.S.C. § 7901(b)(1) (2006).

To that end, the PLCAA provides that "[a] qualified civil liability action may not be brought in any Federal or State court" (15 U.S.C. § 7902(a) (2006)) and a "qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending" (15 U.S.C. § 7902(b) (2006)).

A "qualified civil liability action" is:

> "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party * * *." 15 U.S.C. § 7903(5)(A) (2006).

A "qualified product" means a firearm, or ammunition, or a component part of a firearm or ammuni-

tion, "that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4) (2006).

The appellate court in this case did not address whether plaintiffs' lawsuit was a qualified civil liability action. Rather, the appellate court concluded, without analysis, that the PLCAA applied to plaintiffs' cause of action, so that plaintiffs were required to show that they fell within the exceptions to the Act in order to avoid the provisions of the Act. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559.

In this court, plaintiffs deny that their lawsuit is a qualified civil liability action. Plaintiffs do not dispute that their lawsuit is a civil action or proceeding against a manufacturer of a qualified product and that the Beretta is a qualified product. However, plaintiffs deny that their civil action results from the criminal or unlawful misuse of a qualified product.

The PLCAA defines unlawful misuse as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9) ***761** (2006). The PLCAA does not define " criminal" misuse. As Beretta notes, however, the word "criminal" in this portion of the statute is used as an adjective to modify the term "misuse." Black's Law Dictionary defines "criminal" in its adjective form as, "1. Having the character of a crime; in the nature of a crime <criminal mischief>. 2. Connected with the administration of penal justice <the criminal courts>." Black's Law Dictionary 402 (8th ed.2004).

In this case, Billy was adjudicated delinquent based upon the finding of the court in the juvenile proceed-

ing that Billy committed involuntary manslaughter and reckless discharge of a firearm when he shot Josh with his father's Beretta. This finding was affirmed on appeal. *In re W.S.*, No. 1-02-1170, 343 Ill.App.3d 1300, 305 Ill.Dec. 890, 856 N.E.2d 695 (2003) (unpublished order under Supreme Court Rule 23). Billy's use of the Beretta, therefore, certainly violated the Criminal Code, a statute, when he was adjudicated delinquent for involuntary manslaughter and reckless discharge of a firearm, satisfying the definition of "unlawful misuse."

In addition, involuntary manslaughter (720 ILCS 5/9-3(a) (West 2000)) and reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2000)) are criminal offenses. It follows, then, that Billy's misuse of the Beretta in this case also had the character of a crime and was "in the nature of a crime" and, therefore, was a criminal misuse.

Plaintiffs, however, argue that this court may not look to Billy's juvenile adjudication in determining whether there was a criminal or unlawful misuse because that adjudication was described in an unpublished order pursuant to Illinois Supreme Court Rule 23 (210 Ill.2d R. 23). Plaintiffs also argue that Billy's conduct could not be criminal or unlawful because Billy was adjudicated delinquent, and thus was not "convicted" of anything. Moreover, Billy had no criminal intent, so that his conduct could not be criminal. Finally, plaintiffs contend that Billy was not "using" the handgun, so there could be no unlawful "misuse" of the handgun, as required under the statute.

There is no merit to plaintiffs' claim that this court cannot look to Billy's juvenile adjudication as set

forth in the appellate court's Rule 23 order. As Beretta notes, Illinois Supreme Court Rule 23 provides that unpublished orders of the appellate court may not be cited by any party for precedential value. 166 Ill.2d R. 23(e). However, this court may take judicial notice of the Rule 23 order addressing Billy's appeal of his juvenile adjudication. See *In re Donald A.G.*, 221 Ill.2d 234, 242, 302 Ill.Dec. 735, 850 N.E.2d 172 (2006) (this court took judicial notice of Rule 23 order in underlying criminal case); *People v. Ortiz*, 196 Ill.2d 236, 265, 256 Ill.Dec. 530, 752 N.E.2d 410 (2001) (this court took judicial notice of Rule 23 order in codefendant's case).

Moreover, the definition of qualified civil liability action also does not contain a requirement that there be criminal intent or a criminal conviction. The statute only requires "the criminal or unlawful misuse of a qualified product by the person or a third party." 15 U.S.C. § 7903(5)(A) (2006). With regard to intent, the PLCAA does not limit criminal misuse to specific intent crimes.

Likewise, the PLCAA does not require a criminal conviction. As Beretta observes, Congress did require a conviction in order for another exception to the PLCAA to apply. See 15 U.S.C. § 7903(5)(A)(i) (2006) ("an action brought against a transferor *convicted* under section 924(h) of Title 18, or a comparable or ***762** identical State felony law, by a party directly harmed by the conduct of which the transferee is so *convicted* " (emphases added)). When Congress includes particular language in one section of a statute but omits it in another section of the same act, courts presume that Congress has acted intentionally and purposely in the inclusion or exclusion. *Clay v. United States*, 537 U.S. 522, 528, 123 S.Ct. 1072,

1077, 155 L.Ed.2d 88, 95 (2003). Therefore, because Congress specifically included language requiring a conviction in section 7903(5)(A)(i), but did not include such language in section 7903(5)(A), we presume that Congress did not intend criminal misuse to require proof of a criminal conviction.

Finally, there is no merit to plaintiffs' claim that Billy was not "using" the Beretta, so he could not have "misused" the weapon as set forth in the definition of a qualified civil liability action. Plaintiffs assert that the PLCAA implies the weapon is being used proactively for the purpose of firing or threatening to fire a projectile, and was not designed to apply, for example, where someone "using" a weapon by holding it drops the weapon, causing it to discharge. Plaintiffs claim that Billy was not using the Beretta as a weapon because he did not intend to fire it, so that Billy was not using the firearm as that word is used in the PLCAA.

We again note that the definition of a qualified civil liability action contains no intent requirement, so it does not matter whether Billy intended to fire the Beretta. The relevant inquiry is whether the misuse of the Beretta was criminal or unlawful. Moreover, this is not a case where Billy dropped the Beretta, causing it to accidentally discharge. Rather, Billy took his father's Beretta from his parents' bedroom closet, pointed the Beretta at Josh, and pulled the trigger. Billy therefore "used" the Beretta, and that "use" constituted a criminal or unlawful misuse of the Beretta for purposes of the PLCAA. Accordingly, we find that plaintiffs' lawsuit is a qualified civil liability action as defined in the PLCAA.

Because we find that plaintiffs' lawsuit was a quali-

fied civil liability action, we next address whether the exceptions to the PLCAA apply in this case. The appellate court held that the only exception that applied in this case was the exception set forth in section 7903(5)(A)(v). 378 Ill.App.3d at 533-34, 316 Ill.Dec. 823, 880 N.E.2d 559. Plaintiffs have not challenged this finding. We therefore limit our discussion to section 7903(5)(A)(v). Section 7903(5)(A)(v) provides that a qualified civil liability action shall not include:

> "an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v) (2006).

With regard to this exception, the appellate court held that there was an issue of fact concerning whether Billy's act was volitional and whether Billy's actions were criminal or unlawful, so that it was for the trier of fact to determine whether the exception applied in this case. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court explained that if Billy's actions were criminal, the PLCAA would foreclose plaintiffs' claims against Beretta. 378 Ill.App.3d at 534, 316 Ill.Dec. 823, 880 N.E.2d 559. However, if Billy's actions were purely accidental and not unlawful or criminal, the exception under ***763**section 7903(5)(A)(v) would apply and plaintiffs' failure to warn claim against Beretta would not be precluded. 378 Ill.App.3d at 534, 316

Ill.Dec. 823, 880 N.E.2d 559.

In questioning whether Billy's act was criminal or unlawful, the appellate court relied on the fact that Billy was adjudicated delinquent. The appellate court, citing this court's decision in *People v. Taylor*, 221 Ill.2d 157, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006), noted that a juvenile adjudication is not tantamount to a criminal conviction. In addition, Billy did not intend to shoot Josh. Accordingly, the appellate court concluded that there was a question of fact concerning whether Billy's act was volitional or criminal under the PLCAA.

We initially note that, like the definition of qualified civil liability action in section 7903(5)(A), the exception in section 7903(5)(A)(v) does not require a criminal conviction. The statute requires only that the volitional act constitute a criminal offense. As discussed, *supra,* Billy's act of shooting Josh constituted a criminal offense.

In any event, the appellate court has read our decision in *Taylor* too narrowly. Although this court in *Taylor* held that a juvenile adjudication was not tantamount to a criminal conviction, we also noted that the Juvenile Court Act was radically altered in 1999 "to provide more accountability for the *criminal acts* of juveniles." (Emphasis added.) *Taylor*, 221 Ill.2d at 165, 302 Ill.Dec. 697, 850 N.E.2d 134. Moreover, the purpose and policy section of article V of the Juvenile Court Act declares that it is the intent of the General Assembly "to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency" and, to effectuate that intent, declares among the important purposes of the Act "[t]o protect citizens from *juvenile crime*." (Emphasis added.) 705

ILCS 405/5-101(1)(a) (West 2000). Consequently, the fact that Billy was adjudicated delinquent does not mean that his actions were not criminal for purposes of section 7903(5)(A)(v).

We also find that Billy's act was a volitional act. Black's Law Dictionary defines volition as: "1. The ability to make a choice or determine something. 2. The act of making a choice or determining something. 3. The choice or determination that someone makes." Black's Law Dictionary 1605 (8th ed.2004).

Likewise, Webster's defines volition as: "the act of willing or choosing: the act of deciding (as on a course of action or an end to be striven for): the exercise of the will." Webster's Third New International Dictionary 2562 (1993). Webster's defines volitional as "of, relating to, or of the nature of volition: possessing or exercising volition." Webster's Third New International Dictionary 2562 (1993).

Plaintiffs and the appellate court read volitional to require a finding that Billy intended to shoot Josh or understood the ramifications of his conduct. We disagree. As Beretta argues, even if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger. Although Billy did not intend the consequences of his act, his act nonetheless was a volitional act. Accordingly, pursuant to the PLCAA, the discharge of the Beretta in this case was caused by a volitional act that constituted a criminal offense, which the PLCAA provides "shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v) (2006). The exception for qualified civil liability actions set forth in section 7903(5)(A)(v),

therefore, does not apply, and plaintiffs' failure to warn claims are barred by the PLCAA.

*764 Plaintiffs also argue that section 7903(5)(A)(v) does not apply because Billy's act was not the sole cause of Josh's injury. Plaintiffs, however, have misread the PLCAA. The PLCAA does not require a finding that the volitional act that constituted a criminal offense be the sole proximate cause of any resulting death. Rather, the PLCAA provides that "where the discharge of the product was caused by a volitional act that constituted a criminal offense, *then such act shall be considered the sole proximate cause of any resulting death* * * *." (Emphasis added.) 15 U.S.C. § 7903(5)(A)(v) (2006).

Plaintiffs, however, argue that the PLCAA is unconstitutional because it violates the tenth amendment to the United States Constitution. The tenth amendment states:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X.

Plaintiffs claim that although Congress may generally enact laws requiring or prohibiting certain acts, it may not direct the action of state governments or state officials. Plaintiffs contend that by commanding state courts to immediately dismiss pending cases, the PLCAA leaves state courts with the function of simply confirming a judicial decision that Congress has already impermissibly made. Further, the PLCAA improperly infringes on state sovereignty by dictating to states how they must conduct their lawmaking function with respect to gun liability.

The appellate court in this case rejected plaintiffs' claim that the PLCAA violates the tenth amendment. The appellate court held that "plaintiffs have confused Congress's direct regulation and preemption of state law with commandeering state functions. Congress, Beretta correctly asserts, simply established a new federal standard that governs claims against the gun industry, preempting conflicting state tort law, a common action." 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559. The appellate court noted that the United States District Courts for the Eastern District of New York and the Central District of California have found that the PLCAA is constitutional. The appellate court followed those decisions on the constitutional issues. 378 Ill.App.3d at 533, 316 Ill.Dec. 823, 880 N.E.2d 559 (citing *City of New York v. Beretta U.S.A. Corp.* 401 F.Supp.2d 244 (E.D.N.Y.2005), and *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274 (C.D.Cal.2006)).

Although the district court in *Ileto* was not presented with a tenth amendment challenge to the PLCAA, the district court in *City of New York v. Beretta* did consider and reject such a challenge. The United States Court of Appeals for the Second District affirmed that decision. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir.2008). The Court of Appeals noted that "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states." *City of New York*, 524 F.3d at 396. This is because federal statutes enacted under one of Congress' enumerated powers, such as the commerce clause, cannot violate the tenth amendment unless the statutes commandeer the states' executive officials or legislative processes. *City of New York*, 524 F.3d at 396. The Court of Appeals held that Congress validly enacted the PLCAA

under the commerce clause. *City of New York*, 524 F.3d at 394-95. The Court of Appeals further held that the PLCAA does not commandeer any branch of state government because the PLCAA imposes no affirmative duty of any kind on any branch of state government. *City of New York*, 524 F.3d at 397. The PLCAA, ***765** therefore, does not violate the tenth amendment. *City of New York*, 524 F.3d at 397.

We agree with the decision of the Court of Appeals in *City of New York v. Beretta*. Accordingly, as Beretta argues, because the PLCAA is a valid exercise of the federal power to regulate interstate commerce, Congress has not intruded upon an area of authority traditionally reserved to the states and does not impermissibly commandeer the states or their officials in violation of the tenth amendment. We therefore reject plaintiffs' constitutional challenge to the PLCAA and find that the PLCAA does not violate the tenth amendment.

As stated, we find that the PLCAA requires dismissal of plaintiffs' failure to warn claim against Beretta. We therefore reverse the appellate court's finding that there was an issue of fact concerning whether the PLCAA barred plaintiffs' failure to warn claim.

Plaintiffs' Cross-Appeal

Finally, we note that plaintiffs have filed a cross-appeal challenging the appellate court's finding that the trial court properly dismissed plaintiffs' design defect claims because the Beretta was not unreasonably dangerous as a matter of law. Plaintiffs claim that the Beretta is unreasonably dangerous under both the consumer expectation test and the

risk-utility test.

Upon review, we find that we need not consider whether the appellate court erred in finding that the Beretta was not unreasonably dangerous under the consumer expectation test and the risk-utility test. This court may affirm the appellate court on any basis in the record. *People v. Durr*, 215 Ill.2d 283, 296, 294 Ill.Dec. 115, 830 N.E.2d 527 (2005). As noted, the exception to the PLCAA set forth in section 7903(5)(A)(v) applies to "an action for death, physical injuries or property damage resulting directly from *a defect in design or manufacture of the product*, when used as intended or in a reasonably foreseeable manner." (Emphasis added.) 15 U.S.C. § 7903(5)(A)(v) (2006). We have held that the exception set forth in section 7903(5)(A)(v) does not apply in this case because the discharge of the Beretta was caused by a volitional act that constituted a criminal offense, which act shall be considered the sole proximate cause of any resulting death. Accordingly, plaintiffs' design defect claims, as well as their failure to warn claims, are barred by the PLCAA. For that reason, we affirm the dismissal of those claims.

CONCLUSION

For all the foregoing reasons, the judgment of the appellate court is affirmed in part and reversed in part and the judgment of the circuit court is affirmed.

Appellate court judgment affirmed in part and reversed in part; circuit court judgment affirmed.

Chief Justice FITZGERALD and Justices FREEMAN, GARMAN, KARMEIER, and BURKE

concurred in the judgment and opinion.
Justice KILBRIDE took no part in the consideration or decision of this case.

APPENDIX B
Opinion of the Illinois Court of Appeal
(Nov. 29, 2007)

Appellate Court of Illinois,
First District, Fourth Division.

Hector ADAMES, Jr., and Rosalia Diaz, as Co-Special Administrators of the Estate of Joshua Adames, Deceased, Plaintiffs-Appellants,

v.

Michael F. SHEAHAN, in his Official Capacity as Cook County Sheriff, Beretta U.S.A. Corporation, and Fabbrica D'Armi Pietro Beretta S.P.A., Defendants-Appellees.

No. 1-05-3911.
Nov. 29, 2007.

***563** Michael W. Rathsack, Chicago, for Appellants.

***564** Johnson & Bell, Ltd., Chicago, for Appellee Beretta U.S.A. Corp.

Querrey & Harrow, Ltd., Chicago, for Appellee Michael Sheahan, in his official capacity as Cook County Sheriff.

MODIFIED UPON DENIAL OF REHEARING

Justice MURPHY delivered the opinion of the court:

On May 5, 2001, Joshua Adames (Josh) was shot in the abdomen while playing with William Swan (Billy). Billy's father, David Swan (David), was em-

ployed by the Cook County sheriff's department at the time. Billy, age 13, had found David's service weapon in his parents' bedroom closet and was playing with it when Josh came over. While playing, Billy accidentally shot Josh in the stomach and he died as a result of the abdominal wound.

Plaintiffs, Hector Adames, Jr., and Rosalia Diaz, co-special administrators of the estate of Joshua Adames, brought suit against various defendants. At issue on appeal are plaintiffs' claims against defendant Cook County Sheriff Michael F. Sheahan (Sheahan) and defendant Beretta U.S.A. Corp. (Beretta). Following the conclusion of discovery, the trial court granted defendants' separate motions for summary judgment. Plaintiffs now appeal the trial court's orders granting defendants' motions for summary judgment. For the following reasons, we affirm in part and reverse in part the findings of the trial court and remand this matter for a new trial.

I. BACKGROUND

A. Billy Swan

On the morning of Sunday, May 5, 2001, Billy was home alone while his mother was at work and David and his brother went out. Billy called Josh and invited him over to play. Billy went into his parents' bedroom to watch through their window for Josh's arrival. Billy knew that inviting Josh over and going into his parents' bedroom were both against the rules.

Billy noticed that his parents' closet do or was open and he saw a box on a shelf. Billy retrieved the box, which was unlocked and contained three guns be-

longing to David, including a Beretta 92 Series handgun (handgun) with a full magazine clip of bullets. Billy never saw his father carry or clean a gun in the house, but thought that his father might have a gun.

Billy had never handled a gun before, but he picked up the handgun and pushed a button that released the magazine holding the bullets. Billy replaced the clip and removed it several times. He also moved the slide mechanism at the top of the handgun and a bullet popped out. Billy repeatedly removed and replaced the bullets and magazine from the handgun. Billy stated that he understood the handgun to be loaded when the magazine was in place. However, he thought that bullets came out of the top of the magazine when the handgun was fired, not from within the chamber of the handgun. Billy also thought that removing the magazine fully unloaded the handgun.

After a few minutes, Billy saw his friend, Michael, riding his bicycle outside. Billy took the three guns, put them in his pockets and went downstairs to see Michael. Billy showed Michael the guns and how they worked. Josh arrived and Michael went to another room in Billy's house.

Billy and Josh began wrestling and playing around. Billy showed Josh the handgun, ejecting the magazine and bullets as described above. Billy removed the magazine and the bullet using the slide on the handgun, placing the bullets and magazine ***565** in his pocket. Billy first pretended to fire the handgun six or seven times at Josh before he actually pulled the trigger. Billy knew the handgun was dangerous and it could hurt or kill somebody, but he thought that the magazine had to be loaded in the handgun to fire a bullet. Tragically, the handgun discharged a

chambered bullet that hit Josh in the abdomen.

Billy ran upstairs and put the guns back in his parents' closet. Billy then ran back downstairs and realized that he had shot Josh. He called 911 and told the dispatcher that he found a gun and accidentally shot his friend while playing. Billy also stated that he did not know there were any bullets in the handgun.

Billy was subsequently found delinquent in juvenile court proceedings relating to the shooting. The delinquency holding was based on a finding that Billy committed involuntary manslaughter and reckless discharge of a firearm. Billy was placed on probation. This court affirmed the delinquency finding of the juvenile court. *In re W.S.*, No. 1-02-1170, 343 Ill.App.3d 1300, 305 Ill.Dec. 890, 856 N.E.2d 695 (2003) (unpublished order under Supreme Court Rule 23).

B. David Swan

David testified that he graduated from the police academy in 1988, was deputized with the Cook County sheriff around January 1988, and promoted to lieutenant in 1997 or 1998. David carried a gun with him to work as an officer. When David started with the sheriff's office, his service revolver was a Smith & Wesson .38 Special. Eventually, he became certified in automatic weaponry and the handgun became his service handgun. David was promoted to supervisor and no longer needed his handgun on the job and, therefore, rarely brought it to work. David continued as a supervisor after the incident, even though all of his firearms were confiscated by the police investigators.

David testified that he owned three guns: the handgun, the .38 Special, and a .25 automatic. All three guns were stored in the same locking case, along with ammunition. David stored the case, and additional ammunition, on the top shelf in his closet. He maintained one key to the case on his key ring and an additional key in the junk drawer of his dresser. Approximately a year before the shooting, David completed his annual firearm qualification. David disagreed with Billy's testimony and stated that he locked up all three guns in the lockbox, returned them to the top shelf in his closet and did not touch the guns after that date. For the purposes of defendants' summary judgment motions and these proceedings, the presumption is that the lockbox was unlocked.

David understood that the sheriff's office required deputies to secure and store their weapons in either a locking box, like he used, or with a trigger lock. David testified that, pursuant to department requirements, he stored the ammunition separately from the handgun and that the handgun was stored without a bullet in its chamber. David knew how to check if a bullet was in the chamber and how to clear the weapon. David also knew about trigger locks, but did not have one and did not look into purchasing one for his handgun. However, David was not aware that the handgun would fire a bullet with the magazine removed. David also was unaware of a settlement by Beretta in a different case that included an agreement to include either magazine disconnect safeties in all guns sold after January 1, 2001, or a warning label that the firearm is capable of firing when the magazine is not engaged.

David stated that his house rules included a prohibi-

tion on any child in the parents' bedroom at any time and no one ***566** outside the family was allowed in the house when he or his wife was not home. David testified that he reminded Billy of this rule on May 5, 2001, and Billy told him that he was going to go to the park. David speculated that Billy found the lockbox and the key and gained access to the gun. However, from the moment he returned to the house after the shooting to the day of his deposition, Billy had never openly discussed the shooting. David admitted that he never informed his children that he maintained guns in the household and that he never taught them gun safety.

In response to the shooting, Sheahan filed a complaint against David before the Merit Board claiming that David failed to properly secure and store his handgun. David's guns were taken from him by the police in their investigation and never returned to him. Following a bench trial, David was found not guilty of criminal charges based on the proscription under section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2004)) against improper storage of a firearm in a premise in which a minor under 14 is likely to gain access to the firearm.

C. Sheriff's Office Rules and Policies

Sheahan's general counsel, executive director, and weapons training officers testified to the department's rules and procedures and training programs. At the time of the incident, Sheahan had a general order in place that mirrored or exceeded the requirements of section 24-9 of the Criminal Code of 1961. 720 ILCS 5/24-9 (West 2004). The purpose of the general order is to promote safe gun usage, citing 1,134 Americans were killed in 1997 from accidental

shootings and that, annually, about 300 children are killed in accidental shootings. The general order requires officers to secure duty weapons in a secured lock box container or other location that would prohibit access by unauthorized persons to avoid accidents. In addition, officers are required to store any keys to such locking devices in a secure location separate from the weapon. Officers were taught to expect children to look everywhere in their homes. Therefore, weapons must always be inaccessible to children and properly stored to avoid accidents with children.

Sheahan's training program also included materials on educating family members, particularly children. Education of children was detailed as an additional responsibility beyond proper storage. Specifically included in the materials is the recommendation to openly discuss firearm safety with children and avoid ignoring the issue.

Officers are informed that their responsibility for their firearm includes unintentional discharge because of improper storage, education, or disarming of the firearm. Officers were re certified in their firearms annually, which included a program on home firearm safety. Although David did not need a weapon to perform his duties as a supervisor, he completed this program annually.

D. The Handgun

Extensive testimony and documentation was presented regarding the handgun itself and various safety measures available in the industry. The handgun is a semiautomatic pistol designed for law enforcement and military use. The handgun is loaded

by filling the magazine with bullets and inserting the filled magazine into the magazine well. The handgun is prepared for discharge by chambering the first round, pulling the slide to the rear of the handgun, and releasing it. When the safety is off, the handgun may be fired by its double- action trigger pull. After the chambered round is fire d, the slide recoils to the rear, the spent cartridge is ejected, *567 and the next live round is chambered upon the return of the slide.

This process will continue each time the trigger is pulled until the magazine is empty, at which time the slide remains locked open until the slide catch lever is released. Therefore, the user knows when firing the handgun that the magazine and chamber have been emptied. A user may also check if a round has been chambered by manually pulling the slide back and visually determining if a round has been loaded. Additionally, the handgun has a chamber loaded indicator-a small extractor head painted red-that protrudes from the side of the slide when the chamber is loaded. Other safety devices on the weapon include: an ambidextrous safety-decocking lever; a hammer drop catch; a flared and serrated trigger guard; an automatic firing pin catch; a two-piece inertial firing pin unit; a reversible magazine release button; and a slide overtravel stop. Beretta did not include a magazine disconnect safety on this model.

Each handgun sold by Beretta was packaged with an instruction manual that included specific warnings and safety instructions. Like the training provided by Sheahan, the instruction manual contains repeated warnings of the dangers of firearms and the importance of proper handling and storage to avoid

accidental injury or death. In particular, it contains advice to owners to store guns in locked storage units out of reach of children with ammunition stored separately.

Further, the manual contains advice to owners to make sure the cartridge chamber is empty when storing the handgun. Explicit step-by-step instructions on how to safely and completely unload the handgun are provided. The manual also includes instructions on how to fully engage the safety, release the magazine, fully retract the slide to extract and eject the chambered cartridge, and, finally, visually inspect the open slide and magazine well to ensure all cartridges have been completely ejected. This information is repeated several times in the manual.

E. Expert Testimony

Plaintiffs presented witnesses who opined that the gun as designed was unreasonably dangerous. Plaintiffs' expert, Stanton Berg, a firearms consultant, admitted that an accident-proof handgun is impossible, but claimed that repetitive accidents may be designed out by gun manufacturers. Berg opined that if the handgun had a magazine disconnect safety, a device that stops the firearm from firing when the magazine is not fully inserted, the shooting in this case would not have occurred. Berg noted that this safety device was invented in 1910 and had even been used by Beretta on 92 Series handguns utilized by some police departments. Berg listed over 300 models of handguns that utilize a magazine disconnect safety and concluded that a handgun without such a safety is defective.

Berg continued to opine that the chamber loaded in-

dicator located on the side of the slide was insufficient. He claimed the indicator was too small to provide an effective warning that a bullet was chambered. Berg also testified that the handgun should contain a warning on the firearm itself that it could be fired with the magazine removed. Berg admitted on cross-examination that the nature and function of a firearm is to discharge a projectile at a high rate of speed. Berg stated that the majority of law enforcement agencies in the country utilized firearms without a magazine disconnect safety. Berg also admitted that it was a valid concern of these agencies to assure that they utilize firearms without anything that threatened to be an impingement on the firing of the gun.

***568** Wallace Collins, a firearms and ammunition design and safety expert, testified to his study of safety assists suitable for handguns. Collins determined that the following safety characteristics were available at the time the handgun was manufactured, but were not included: a magazine disconnect safety; a warning that the gun will fire when the magazine is released; a better-located chamber-loaded indicator with clear directions; and a key lock. Therefore, Collins concluded that the handgun was unnecessarily dangerous.

Collins testified that these safety features were readily available, inexpensive, and commercially feasible. Collins opined that the key safety component that was missing was the magazine disconnect safety. Collins concluded that countless accidents like the shooting in this case could be avoided by the implementation of the devices.

Stephen Teret, a professor of epidemiology for the

School of Public Health at Johns Hopkins University, also was deposed as a witness for plaintiffs. Teret prepared a report on the shooting and testified that he concluded that the absence of a magazine disconnect safety caused the shooting in this case. Teret included data in his report from a survey designed by the Johns Hopkins Center for Gun Policy and Research, performed by the National Opinion Research Center and reported in the Journal of Public Health Policy. The survey asked respondents whether they thought that a pistol can still be shot when its magazine is removed. Of the 1,200 respondents: 65% answered the pistol could still be fired; 20.3% answered the pistol could not be fired; 14.5% did not know; and .2% refused to answer. Of the 34.8% who responded that the pistol could not fire when the magazine is removed or that they did not know, 28% lived in a gun-owning household. Teret also testified that he felt the chamber loaded warning was not effective and could not possibly warn people who have no knowledge about guns.

Witnesses for Beretta testified that they understood that children gain access to guns and accidental shootings have occurred both with and without the magazine inserted in the gun. It was agreed that this incident would not have occurred with a magazine disconnect safety installed on the handgun. It was further admitted that Beretta was capable of manufacturing guns with such a feature at a cost of up to $10 per gun. However, Beretta did not include a magazine disconnect because there was no market demand for that feature. Beretta also admitted to other manufacturers' use of the aforementioned safety devices on their handguns.

Beretta introduced evidence that the Beretta FS is

utilized by police departments throughout the country. Testimony was presented that the handgun, as manufactured, met or exceeded industry standards. Further testimony on behalf of Beretta claimed that for the past 20 years, the vast majority of law enforcement agencies have consistently expressed a preference for no magazine disconnect safety or internal locking devices. Law enforcement officers and agencies do not want weaponry that may become inoperable by an inadvertent release of the magazine, that could possibly jeopardize the safety of officers and the public.

F. Motions for Summary Judgment

Both defendants filed motions for summary judgment. The trial court granted the motions in separate orders dated August 23, 2005. With respect to Sheahan, the trial court found that questions of material fact remained to preclude summary judgment on plaintiffs' arguments regarding the propriety of weapon storage and scope of employment. However, summary ***569** judgment was granted based on the trial court's finding that Sheahan did not have a duty to protect the victim from the criminal acts of Billy Swan. The trial court also noted that, had a duty existed, the cause of the harm was not reasonably foreseeable.

Beretta argued in its motion for summary judgment that its product was not unreasonably dangerous, it had no duty to warn due to the obvious danger, and that Billy Swan's actions were an intervening cause. Beretta's motion was granted in its entirety. Plaintiffs timely filed their appeal of these two rulings.

II. ANALYSIS

Summary judgment may be granted when "the pleadings, depositions, and admissions on file, [and] affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2004). The sole function of the trial court is to determine if material issues of fact exist; it is not to try the issues. *Kim v. Citigroup, Inc.*, 368 Ill.App.3d 298, 305, 305 Ill.Dec. 834, 856 N.E.2d 639 (2006). We review an order granting summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill.2d 342, 349, 233 Ill.Dec. 643, 701 N.E.2d 493 (1998). While we also review the evidence in a light most favorable to the nonmovant, we cannot ignore evidence unfavorable to the nonmovant and may sustain the trial court on any basis called for in the record. *Ruane v. Amore*, 287 Ill.App.3d 465, 474, 222 Ill.Dec. 570, 677 N.E.2d 1369 (1997).

Plaintiffs assert five issues on appeal. With respect to Sheahan, plaintiffs argue that the trial court erred in finding that Sheahan had no duty to Josh and that Billy Swan's conduct was criminal and an independent intervening cause. As to the claims against Beretta, plaintiffs argue that the trial court erred in: failing to find that the handgun was unreasonably dangerous from failure to include a magazine disconnect or a sufficient chamber loaded indicator; failing to find that the handgun was unreasonably dangerous for failing to adequately warn the user; and, as with Sheahan, finding that Billy Swan's conduct was an independent intervening cause superceding Beretta's legal responsibility. However, Beretta asserts in its response and sur-reply that the United

States Congress's enactment of the Protection of Lawful Commerce in Arms Act (PLCAA) (Pub.L. 109-12, 119 Stat. 2095 (2005)) (adding 15 U.S.C. § 7901 through 7903) provides gun manufacturers immunity from claims such as those advanced by plaintiffs.

A. Scope of Sheahan's Duty to Third Parties

Plaintiffs first argue that the trial court erroneously determined that Sheahan had no duty to protect Josh from a criminal attack. While the question of duty is a question of law to be determined by the trial court, plaintiffs maintain that because of the trial court's reliance on the criminal attack, it failed to examine the proper factors to determine whether a party owes a duty to another. Plaintiffs argue that they established the factors relevant to the establishment of a duty, namely: reasonable foreseeability of the injury; the likelihood of injury; the magnitude of the burden to guard against such an injury; and the consequences of placing that burden on the defendant. *Ward v. K mart Corp.*, 136 Ill.2d 132, 140-41, 143 Ill.Dec. 288, 554 N.E.2d 223 (1990). Therefore, plaintiffs argue that the finding of the trial court must be reversed.

Plaintiffs argue that Sheahan owed a duty to Josh. Plaintiffs cite the rules and training materials created by the sheriff's department requiring safe and secure storage ***570** of handguns by officers. In addition, plaintiffs argue that under common law and section 24-9 of the Criminal Code of 1961 (720 ILCS 5/24-9 (West 2004)), Sheahan has a duty to assure his deputies safely secure their service firearms away from children. Furthermore, plaintiffs note that in *Gaffney v. City of Chicago*, 302 Ill.App.3d 41,

236 Ill.Dec. 40, 706 N.E.2d 914 (1998), which is taught to deputies during weapons training, this court found the defendant city liable for one of its police officer's failure to properly st ore his fire arm.

In *Gaffney*, a police officer for the City of Chicago stored his unloaded service revolver and bullets together in an unlocked metal cabinet in his home. The officer's minor son took the unsecured revolver and bullets to a party and shot and killed a boy. The minor shooter was subsequently adjudicated delinquent for the shooting. *Gaffney*, 302 Ill.App.3d at 44, 236 Ill.Dec. 40, 706 N.E.2d 914. This court reversed the trial court's grant of judgment notwithstanding the verdict to the City and found that the officer was acting within the scope of his employment at the time he stored his revolver. *Gaffney*, 302 Ill.App.3d at 43-44, 236 Ill.Dec. 40, 706 N.E.2d 914. Although the police department had no rules, general orders, or directives requiring officers to lock up guns at home, this court found that the officer was acting within the scope of his employment when storing his revolver at home. This court specifically cited to the police department's training and disciplining officers for off-duty weapon storage issues, testimony that the officer was required to perform authorized tasks whenever the need arose, and the officer's testimony that he stored the revolver unlocked to assure he could carry out his duties on a moments notice. This evidence supported the conclusion that a triable issue of fact remained that he was acting within the scope of employment in storing his revolver. *Gaffney*, 302 Ill.App.3d at 48-49, 236 Ill.Dec. 40, 706 N.E.2d 914. Plaintiffs highlight testimony of Sheahan's range master that *Gaffney* is taught because it establishes liability against an officer and the department if an unauthorized person gains access to an improp-

erly stored handgun.

Plaintiffs also assert that the trial court erred in finding that a criminal attack even occurred. Plaintiffs note that Billy testified that the shooting was an accident and that defendants' experts agreed as much. Therefore, plaintiffs claim that since the shooting was unintentional, it was not a criminal attack and did not support the trial court's judgment. Plaintiffs argue that this case involved an accident by someone who clearly did not actively intend the out come. Plaintiffs assert that even if one is found guilty of reckless or negligent conduct, he may still seek contribution from a negligent third party if he has not committed an intentional tort. Therefore, they conclude that they should not be barred from seeking compensation for Billy's negligence. See *Ziarko v. Soo Line R.R. Co.*, 161 Ill.2d 267, 204 Ill.Dec. 178, 641 N.E.2d 402 (1994).

Furthermore, plaintiffs argue that the trial court relied upon an unpublished order entered pursuant to Supreme Court Rule 23. Plaintiffs note that the trial court's only reference to evidence of the juvenile proceeding against Billy was to the Rule 23 order and no other evidence is of record. Plaintiffs assert that the Rule 23 order has no precedential value and cannot be utilized for this purpose. *Price v. Hickory Point Bank & Trust*, 362 Ill.App.3d 1211, 1221, 299 Ill.Dec. 352, 841 N.E.2d 1084 (2006). Therefore, plaintiffs claim the trial court had no support for its finding.

***571** Sheahan responds that a party does not have a duty to protect another from criminal attack absent a special relationship unless it voluntarily undertakes actions to protect that person. *Rowe v. State Bank of Lombard*, 125 Ill.2d 203, 215-16, 126 Ill.Dec. 519,

531 N.E.2d 1358 (1988). Special relationships that have been found to create a duty are: common carrier and passenger; innkeeper and guest; business inviter and invitee; and voluntary custodian and protectee. *Hernandez v. Rapid Bus Co.*, 267 Ill.App.3d 519, 524, 204 Ill.Dec. 456, 641 N.E.2d 886 (1994). Sheahan concludes that no special relationship existed with Josh and that he did not perform any voluntary undertaking to create a duty to protect Josh. Sheahan argues that the recent trend in cases has identified a fear of the expansion of liability and the special relationship rule. See *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004); *Young v. Bryco Arms*, 213 Ill.2d 433, 290 Ill.Dec. 504, 821 N.E.2d 1078 (2004); *Charleston v. Larson*, 297 Ill.App.3d 540, 231 Ill.Dec. 497, 696 N.E.2d 793 (1998).

Sheahan notes that, though the Rule 23 order affirming the delinquency adjudication was not included in the record, the trial court cited to the order. Sheahan adds that this court may take judicial notice of its own opinions and attached the order to his brief for that purpose. *Dawdy v. Union Pacific R.R. Co.*, 207 Ill.2d 167, 177, 278 Ill.Dec. 92, 797 N.E.2d 687 (2003). Contrary to plaintiffs' assertion, Sheahan argues that the Rule 23 order has a preclusive effect to the extent that it affirmed Billy's adjudication and that it was not utilized as precedent based on its legal analysis. Furthermore, Sheahan argues that the information is of record as David testified to the findings of the juvenile court against Billy. As to the actual crime committed, Sheahan points out that specific intent is not required for involuntary manslaughter and Billy's reckless behavior does not remove the criminality of that conduct.

Sheahan continues that a duty may not be estab-

lished by internal rules and policies. *Rhodes v. Illinois Central Gulf R.R.*, 172 Ill.2d 213, 238, 216 Ill.Dec. 703, 665 N.E.2d 1260 (1996). Sheahan argues that the training and general orders with respect to gun safety may establish a standard of care applicable to his officers, but do not establish a duty. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill.2d 278, 295, 246 Ill.Dec. 654, 730 N.E.2d 1119 (2000). Sheahan distinguishes *Gaffney* on this subject, asserting that the *Gaffney* court did not examine the question of duty. Sheahan notes that the issue in *Gaffney* was whether the defendant police officer was acting within the scope of his employment when he stored his gun at home. *Gaffney*, 302 Ill.App.3d at 48-49, 236 Ill.Dec. 40, 706 N.E.2d 914. In addition, Sheahan asserts that there was no criminal conviction of the child who accessed the gun in that case.

Sheahan concludes that, most importantly, the shooting was not foreseeable and, therefore, no duty could exist. Sheahan maintains that David could not reasonably foresee that Billy would: break his rules against children in the bedroom; find the gun box; unload the gun box; load and unload the gun; and finally shoot Josh. Sheahan argues that this lack of foreseeability takes this case out of the firearms storage statute and no duty existed as a matter of law.

As noted above, the trial court denied the motion to dismiss on the scope of employment issue because an issue of fact remained, but granted the motion on the duty issue. Therefore, Sheahan maintains that this is not a scope of employment ***572** case. However, plaintiff sought damages against Sheahan based on the principle of *respondeat superior*. A discussion of the relevant principles of *respondeat superior* should illuminate and resolve this issue.

"The general rule is that a person injured by the negligence of another must seek his or her remedy from the person who caused the injury. The relation of employer and employee is an exception to this general rule. *Darner v. Colby*, 375 Ill. 558, 560 [31 N.E.2d 950] (1941); *Metzler v. Layton*, 373 Ill. 88, 91 [25 N.E.2d 60] (1939). Under the theory of *respondeat superior*, an employer can be liable for the torts of an employee, but only for those torts that are committed within the scope of the employment. *Wright v. City of Danville*, 174 Ill.2d 391, 405 [221 Ill.Dec. 203, 675 N.E.2d 110] (1996); *Pyne v. Witmer*, 129 Ill.2d 351, 359 [135 Ill.Dec. 557, 543 N.E.2d 1304] (1989). Indeed, the employer's vicarious liability extends to the negligent, willful, malicious, or even criminal acts of its employees when such acts are committed within the scope of the employment. See *Mitchell v. Norman James Construction Co.*, 291 Ill.App.3d 927, 932 [225 Ill.Dec. 881, 684 N.E.2d 872] (1997); *Randi F. v. High Ridge YMCA*, 170 Ill.App.3d 962, 964 [120 Ill.Dec. 784, 524 N.E.2d 966] (1988); *Webb v. Jewel Cos.*, 137 Ill.App.3d 1004, 1006 [92 Ill.Dec. 598, 485 N.E.2d 409] (1985).

The term 'scope of employment,' used interchangeably with 'in the course of the employment,' refers to a 'bare formula,' whose 'very vagueness has been of value in permitting a desirable degree of flexibility in decisions.' W. Keeton, Prosser & Keeton on Torts § 70, at 502 (5th ed.1984). The Second Restatement of Agency has identified three general criteria in determining whether an employee's acts are within the scope of employment.

'(1) Conduct of a servant is within the scope of em-

ployment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master * * *[.]

* * *

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. (Restatement (Second) of Agency § 228 (1958).) *Pyne*, 129 Ill.2d at 360 [135 Ill.Dec. 557, 543 N.E.2d 1304].' " *Bagent v. Blessing Care Corp.*, 224 Ill.2d 154, 163-64, 308 Ill.Dec. 782, 862 N.E.2d 985 (2007).

"Under the doctrine of *respondeat superior*, a principal may be held liable for the tortious actions of an agent which cause a plaintiff's injury, even if the principal does not himself engage in any conduct in relation to the plaintiff." *Woods v. Cole*, 181 Ill.2d 512, 517, 230 Ill.Dec. 204, 693 N.E.2d 333 (1998). This is so even though "[o]nly the agent is at fault in fact for the plaintiff's injuries." *American National Bank & Trust Co. v. Columbus-Cuneo-Cabrini Medical Center*, 154 Ill.2d 347, 354, 181 Ill.Dec. 917, 609 N.E.2d 285 (1992).

Both before the trial court and this court, Sheahan strenuously argues that David violated sheriff's department regulations and numerous directives of

staff *573 members of the sheriff's department when he failed to put the handgun in a secure locked box. However, it is a well-settled legal principle that where an agent does an act in the course of his employment, although the principal did not authorize or participate in, or know of the conduct, or even if he forbade the acts or disapproved of them, the rule of *respondeat superior* applies. *Lynch v. Board of Education of Collinsville Community Unit District No. 10*, 82 Ill.2d 415, 424-25, 45 Ill.Dec. 96, 412 N.E.2d 447 (1980).

Our supreme court most recently addressed the rule of *respondeat superior* in *Bagent*. There, the court held that "all three criteria of section 228 of the Second Restatement of Agency must be met to conclude that an employee was acting within the scope of employment." *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. The court further held that whether an employee was acting within the scope of employment depends on "the employment contract and the nature of the relationship, which must exist at the time of and in respect to the particular facts out of which the injury arose." *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. Section 229 sets out a nonexhaustive list of several factual matters to consider in determining whether the complained-of act is so similar or incidental to employer-authorized conduct:

"Pertinent matters include: whether the act is one commonly done by such employees; the time, place, and purpose of the act; the previous relations between the employer and the employee; whether the act is outside the enterprise of the employer or, if within the enterprise, has not been entrusted to any employee; whether the employer has reason to

> expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether the employer furnished to the employee the instrumentality by which the harm is done; and the extent of departure from the normal method of accomplishing an authorized result." *Bagent*, 224 Ill.2d at 166-67, 308 Ill.Dec. 782, 862 N.E.2d 985, citing Restatement (Second) of Agency § 229(2) (1958).

An employer's warning to an employee to act with care does not remove an employer from vicarious liability. Although an express prohibition may argue against an act being within the scope of employment, it is only a factor in determining the issue. *Bagent*, 224 Ill.2d at 167-68, 308 Ill.Dec. 782, 862 N.E.2d 985. It is the plaintiff's burden to show the contemporaneous relationship between the tortious act and the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985. However, for purposes of summary judgment, it must be shown that no reasonable person could conclude from the evidence that an employee was acting within the scope of employment. *Bagent*, 224 Ill.2d at 165, 308 Ill.Dec. 782, 862 N.E.2d 985.

We find that the facts of this case are similar to those presented in *Gaffney* and that case is controlling. The *Gaffney* court considered the aforementioned factors from sections 228 and 229 of the Restatement. *Gaffney*, 302 Ill.App.3d at 51-52, 236 Ill.Dec. 40, 706 N.E.2d 914. As in this case, Sheahan would be hardpressed to say that officers did not store their weapons at home; in fact, like in *Gaffney*, the specific training and materials on proper storage supports a finding that the act is incidental to an act David was hired to perform. While David did not

carry his weapon to work daily like the defendant police officer in *Gaffney*, and he did not testify that he stored his gun unlocked to respond to any emergency in his presence, he did testify that he owned the firearm *574 because of his job and annually was certified to use the firearm as required by Sheahan. David's continued storage of the gun was not outside the enterprise of his employer and David maintained the firearm for the purpose of serving as a deputy sheriff. As in *Gaffney*, the evidence that Sheahan further disciplined officers for improper storage supports the conclusion that such storage is incidental to employment. This also argues to the factor that the improper storage was not an act that the servant was unlikely to do.

These facts also support a finding that David was acting within the authorized time and space limits of his employment. In addition to the above, testimony was presented that there were insufficient storage opt ions at the department and home storage was expect ed. While David testified that he did not carry his firearm to work for his daily duties, the fact remains that he did at one time, he owned the firearm for work purposes, he would be required to use it in an emergency, he was certified annually to use the firearm, and he ultimately was disciplined by Sheahan for his improper storage. While the facts of this case do not present the same explicit testimony from *Gaffney* about an officer's being "on duty" 24 hours a day, these facts argue in favor of finding David was acting within the scope of employment and Sheahan is liable for David's alleged tortious actions.

Accordingly, we must determine whether the trial court erred in finding Billy's actions foreclosed a duty to the victim. First, we note that neither side dis-

cussed the importance of the fact that Billy's adjudication of delinquency was conducted, naturally, pursuant to the Juvenile Court Act of 1987. 705 ILCS 405/1-1 *et seq.* (West 2004). Although both the trial court and Sheahan repeatedly raise the import of Billy's "conviction" for criminal acts, our supreme court recently rejected this categorization. *People v. Taylor*, 221 Ill.2d 157, 163-71, 302 Ill.Dec. 697, 850 N.E.2d 134 (2006). The *Taylor* court highlighted the Juvenile Court Act procedures both before and after its major amendments in 1999 and found that a juvenile adjudication has never been a "conviction" as defined under the Criminal Code of 1961. 720 ILCS 5/2-5 (West 2004).

Under the Criminal Code, a conviction requires either a plea of guilty or a verdict entered by a jury or court of competent jurisdiction authorized to try the case without a jury. 720 ILCS 5/2-5 (West 2004). Although a juvenile may plead guilty under section 5-605 of the amended Juvenile Court Act (705 ILCS 405/5-605 (West 1998)), minors do not have a right to a jury trial under that act within the meaning of the sixth amendment. *Taylor*, 221 Ill.2d at 168, 302 Ill.Dec. 697, 850 N.E.2d 134. In fact, delinquency proceedings are not criminal, but civil in nature, intended to correct and rehabilitate, not punish. *In re R.G.*, 283 Ill.App.3d 183, 186, 218 Ill.Dec. 699, 669 N.E.2d 1225 (1996). Further, under the Juvenile Court Act, the State may move to permit prosecution of the juvenile under the criminal laws if the alleged offense is of such a serious nature. 705 ILCS 405/5-805(3) (West 2004). Therefore, a juvenile adjudication is not tantamount to a criminal conviction. *Taylor*, 221 Ill.2d at 170, 302 Ill.Dec. 697, 850 N.E.2d 134.

We also note that in civil cases, Illinois courts have similarly differentiated between criminal behavior by an adult and a minor in discussing public policy. In the context of an insurance coverage dispute and application of the inferred-intent standard, this court affirmed that public policy in Illinois favors affording compensation to victims. *575 *Country Mutual Insurance Co. v. Hagan*, 298 Ill.App.3d 495, 232 Ill.Dec. 433, 698 N.E.2d 271 (1998). The *Hagan* court likened exclusionary provisions in insurance policies to negligence cases where specific intent to injure requires an ability to foresee the consequences of an act. The court refused to infer that a 14-year-old minor insured had the capacity to form the intent to sexually abuse a 6-year-old was a question for the trier of fact. *Hagan*, 298 Ill.App.3d at 505, 232 Ill.Dec. 433, 698 N.E.2d 271. The court concluded that holding perpetrators responsible for actions they intend but of which they have little understanding of the ramifications, would have little deterrent effect and would be far outweighed by the policy in favor of compensating victims. *Hagan*, 298 Ill.App.3d at 505, 232 Ill.Dec. 433, 698 N.E.2d 271.

Accordingly, Billy was not convicted of a crime. Sheahan correctly notes that *Gaffney* did not involve a criminal conviction of the minor that accessed his father's gun. Indeed, similar to this case, *Gaffney* involved a juvenile court delinquency adjudication of the minor. Although *Gaffney* did not include an analysis of the import of the minor's adjudication, it is not distinguishable on this point as Sheahan maintains.

The question that remains is whether *Taylor* impacts the trial court's, and Sheahan's, reliance on the adjudication to foreclose a duty. Although plaintiffs' ar-

gument that Billy's lack of intent eliminates the criminality required to overcome duty is misguided, the element of intent does take on more importance when viewed in light of *Taylor*. Plaintiffs argue that Billy did not intend to hurt Josh; therefore, there was no criminal attack, but merely an accident. As such, plaintiffs conclude that there was no intervening criminal attack to foreclose a duty to the victim. This reasoning is in line with that of the *Hagan* court.

The determination of duty is a question of law, that question may only be answered upon review of the factual circumstances of the particular case. *Hernandez*, 267 Ill.App.3d at 522, 204 Ill.Dec. 456, 641 N.E.2d 886. Taking a view of plaintiffs' presentation of facts under a favorable view, we find that this incident was reasonably foreseeable. Whether Billy's actions were accidental or reckless is a question of material fact that remains for the trier of fact to determine.

Plaintiffs assert that they did not cite to Sheahan's rules and orders to establish a duty, but to show that an incident like the instant situation was eminently foreseeable. Plaintiffs argue that Sheahan's repeated warnings to lock firearms and store ammunition separately and citing to *Gaffney* to underscore the importance of doing so in a place away from children clearly indicate this case was foreseeable. Under plaintiffs' theory, David stored the handgun next to ammunition in an unlocked storage case in an unlocked closet where a 13-year-old boy could easily access such an item of natural "magnetic" intrigue. These particular facts, coupled with the evidence of an acute awareness by Sheahan of these types of incidents, section 24-9 of the Criminal Code, titled

"Firearms; Child Protection" (720 ILCS 5/24-9 (West 2004)), and data that this exact scenario plays out across the country every year, indicate the accident was foreseeable for the purposes of summary judgment.

As noted above, the trial court found that no duty existed because of the lack of foreseeability of a criminal attack and the lack of special relationship. Aside from a citation to *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004) and our supreme court's specific reluctance to expand duty where it would impose potentially limitless liability for the acts of another, *576 the trial court did not discuss the additional duty factors of the likelihood of injury, the magnitude of the burden to guard against the injury or the consequences of imposing that burden. While under *Ruane* this court may affirm the trial court on any basis in the record, the record in this case does not support an argument that such a duty would be so onerous.

Sheahan argues that even if this shooting was foreseeable, the other factors required to establish duty have not been met. Most importantly, Sheahan asserts that the magnitude and burden of guarding against this type of injury is too high to create a duty. Sheahan maintains that rigorous training is undertaken in teaching gun safety and proper gun storage and to require more of the department would be tantamount to "tucking them in bed" and be unduly burdensome. In conclusion, he argues that establishing a duty in this scenario would open the door to ruinous liability claims against the county anytime an officer's gun is misappropriated and used for harm.

We reject Sheahan's argument that no duty exists based on these additional factors. First, as noted above, Sheahan is vicariously liable under the principle of *respondeat superior* for the torts of his employees when committed within the scope of employment. Second, the likelihood of injury follows the foreseeability discussion above. The record is replete with testimony and evidence that this type of accident is all too common and foreseeable. Our legislature has seen fit to protect children by codifying safe gun storage practices in a statute section entitled "Firearms; Child Protection." 720 ILCS 5/24-9 (West 2004). Sheahan notes that *Gaffney* involved a scope of employment issue and not a consideration of duty. While *Gaffney* did not include a duty analysis, it ostensibly involved a finding that the defendant city had a duty to protect children from the negligent actions of its police officers. This situation is distinguishable from a resultant crime spree with a stolen gun; it is exactly the scenario the legislature and law enforcement have foreseen and tried to limit. The public interest in protecting children from this harm simply outweighs the burden of assuring police officers properly store their weapons. David's storage of his firearm was incidental to his conduct authorized by Sheahan and summary judgment was improper on this issue.

B. Proximate Cause and Independent Intervening Cause

Plaintiffs next argue that Billy's actions were not an independent intervening cause that superseded Sheahan's negligence or Beretta's legal responsibility. Plaintiffs assert that they satisfied the foreseeability criterion, both cause in fact and legal cause, to

establish a duty and determine proximate cause. Based on the argument above, plaintiffs claim that Billy's actions were foreseeable and summary judgment was improper.

To establish proximate cause, a party must first show that the defendant's negligence was the actual cause of the injury. *Bourgonje v. Machev*, 362 Ill.App.3d 984, 1007, 298 Ill.Dec. 953, 841 N.E.2d 96 (2005). Plaintiffs assert that if the handgun was properly stored and secured as required by statute and Sheahan's general order, the shooting would not have occurred. Therefore, they argue that they established cause in fact, the first prong of proximate cause.

The second prong, legal cause, is met if it can be shown that the defendant's conduct was so closely tied to the injury that he may be found legally responsible. *Bourgonje*, 362 Ill.App.3d at 1007, 298 Ill.Dec. 953, 841 N.E.2d 96. Plaintiffs note ***577** that the exact harm involved need not be foreseeable, but only that some harm might result. *Brannon v. Southern Illinois Hospital Corp.*, 69 Ill.App.3d 1, 10, 25 Ill.Dec. 162, 386 N.E.2d 1126 (1978). Plaintiffs argue that the facts in this case present a strong argument for legal cause because the injury suffered is the exact type of harm the handgun storage statute and Sheahan's rules were enacted to prevent.

Because of this, plaintiffs argue that the trial court erred in finding Billy's actions an independent intervening cause. In order to escape liability as an intervening cause, an event must be unforeseeable as a matter of law. *Mack v. Ford Motor Co.*, 283 Ill.App.3d 52, 57, 218 Ill.Dec. 465, 669 N.E.2d 608 (1996). Plaintiffs highlight as error the trial court's

characterization that Billy loaded and unloaded the handgun before firing it at Josh. Plaintiffs claim that the court erred in making this characterization and then finding that Billy engaged in a criminal act. Plaintiffs contend that, even if some element of Billy's conduct was criminal, such criminal activity is no longer an independent intervening act *per se* under *Bourgonje*. *Bourgonje*, 362 Ill.App.3d at 1008, 298 Ill.Dec. 953, 841 N.E.2d 96. As noted above, plaintiffs focus on the fact that Billy did not intend to shoot Josh. Therefore, Billy's actions were foreseeable and did not supersede Sheahan's liability. Plaintiffs assert that if the trial court's ruling is allowed to stand, it would effectively eliminate any cause of action for negligent storage of a weapon. Plaintiffs claim that the act of pulling the trigger ultimately required would always operate to cutoff liability.

With respect to Beretta, plaintiffs argue that Beretta's experts conceded that children gain access to guns and that accidental shootings occur, specifically, accidents exactly like the instant scenario. In fact, plaintiffs note that Beretta's expert stated that this type of scenario was the impetus for the creation of the magazine disconnect safety in 1910. Furthermore, plaintiffs note that Beretta manufactured other firearms with additional safeguards. Therefore, plaintiffs conclude that Billy's actions were not an independent intervening cause to absolve Beretta of liability for this tragedy.

Sheahan responds that David's storage of the handgun was a condition and not a cause of the shooting. Where the action of a defendant does not cause the injury, but a third party acting independently causes the injury, the creation of the condition is not a proximate cause. *Young*, 213 Ill.2d at 449, 290

Ill.Dec. 504, 821 N.E.2d 1078. Under *Young*, the key consideration in a case such as this is whether the intervening cause is such that a reasonable person would find it a likely result of the complained of conduct. *Young*, 213 Ill.2d at 449, 290 Ill.Dec. 504, 821 N.E.2d 1078, quoting *First Springfield Bank & Trust v. Galman*, 188 Ill.2d 252, 258, 242 Ill.Dec. 113, 720 N.E.2d 1068 (1999). Sheahan argues that the aforementioned actions of Billy, both criminal and in violation of David's house rules, were not foreseeable to a reasonable person and, therefore, David's actions were not a proximate cause.

Beretta also relies on *Young* to argue that Billy's criminal actions were an unforeseeable intervening cause relieving it of liability as a matter of law. Beretta argues that the adjudication of Billy as delinquent based on his commission of involuntary manslaughter and reckless discharge of a firearm and Billy's testimony affirm that he recklessly pulled the trigger and committed the crime. Beretta also cites to two federal cases that are factually similar to this case for support. ***578***Eichstedt v. Lakefield Arms Ltd.*, 849 F.Supp. 1287, 1291-92 (E.D.Wis.1994) (17-year-old boy's pointing rifle at friend and pulling trigger was reckless by any reasonable person, especially an "experienced handler of guns" like the shooter and summary judgment for gun manufacturer was proper); *Raines v. Colt Industries, Inc.*, 757 F.Supp. 819, 822-26 (E.D.Mich.1991) (summary judgment was proper where the handgun is a simple tool, danger is open and obvious, and shooter had played with gun for two days with prior experience manipulating the gun). Not only are these cases based on Wisconsin and Michigan laws and, as such, are merely persuasive authority, but they are distinguishable on the facts as well. Both cases in-

volved gun users that were both older and more experienced than Billy. Furthermore, as noted below, the exception for the open and obvious danger of a simple product has been rejected in Illinois as a *per se* rule against liability. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 262-63, 309 Ill.Dec. 383, 864 N.E.2d 249 (2007).

Proximate cause may not be proven based upon speculation or surmise, but must be proven to a reasonable certainty. *Bourgonje*, 362 Ill.App.3d at 1007, 298 Ill.Dec. 953, 841 N.E.2d 96. As addressed above, viewing plaintiffs' complaint and evidence favorably, cause in fact was shown because the shooting would not have occurred if the handgun had been properly stored. Second, it was reasonably foreseeable that this type of harm would occur if the handgun was not properly stored based on the testimony of several experts and the specific rules and laws implemented for this exact concern.

The trial court opined that finding proximate cause in this case would create liability for Sheahan for any harm created if a weapon was stolen from an officer. However, plaintiffs do not argue for this extensive a finding. Rather, they point to Billy's testimony that the gun and ammunition were negligently stored in an unlocked case in violation of Illinois law and Sheahan's training and rules. This case is distinguishable from a stolen weapon scenario.

Under plaintiffs' theory, Billy in no way "stole" the handgun, as he never intended to deprive David of possession of the handgun and the underlying negligent storage is the cause of the harm. Whether or not that is the case, the scenario in this case in fact is exactly what the gun storage statute and Sheahan's

own departmental rules and training programs sought to avoid. In this case, a child found an improperly stored gun and played with it. While playing, the gun was accidentally discharged.

With respect to the intervening cause, Billy was adjudicated a delinquent, not convicted of a crime. While this court affirmed the findings of the juvenile court, the proceedings before that court are not of record. Whether Billy's actions were criminal and unforeseeable is an open question considering the fact that he is not a convicted criminal and the evidence presented by plaintiffs. Plaintiffs continue to assert that there was no intervening intentional attack to break the causal chain. In any event, under *Bourgonje,* whether Billy's actions were criminal or tortious in nature under the common law is not necessarily outcome determinative. Furthermore, as noted above, under *Hagan,* public policy dictates a differentiated approach to considering behavior by a child intentional and criminal as compared to that of an adult. We have concluded above that this accident was foreseeable and, therefore, it is a question for the jury.

C. Plaintiffs' Claim the Handgun Was Unreasonably Dangerous

Plaintiffs next argue that the trial court erred in failing to find the handgun unreasonably ***579** dangerous under their strict product liability claim. Plaintiffs dispute Beretta's claim that the sole function of the handgun is to fire a projectile with each pull of the trigger. Plaintiffs argue that the function of the gun changed when Billy removed the magazine because he believed it to be unloaded, as if the safety were engaged, and, essentially, it became a toy gun.

Additionally, they assert that the existence of a manual safety indicates that the handgun did not serve only one purpose, but had shifting functions. Plaintiffs assert that they demonstrated that the handgun was unreasonably dangerous and defectively designed under both the consumer expectation test and risk-utility test for product liability claims as detailed in *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 433, 261 Ill.Dec. 744, 764 N.E.2d 35 (2002).

1. Consumer Expectation Test

Under the consumer expectation test, a plaintiff may prove a product defective " 'by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.' " *Hansen*, 198 Ill.2d at 433, 261 Ill.Dec. 744, 764 N.E.2d 35, quoting *Lamkin v. Towner*, 138 Ill.2d 510, 529, 150 Ill.Dec. 562, 563 N.E.2d 449 (1990). Beretta properly notes that the reasonable consumer for this review is not necessarily the user at the time of the incident, but the "typical user and purchaser" of the product, in this case, a licensed firearm owner. *Calles v. Scripto-Tokai Corp.*, 224 Ill.2d 247, 257, 309 Ill.Dec. 383, 864 N.E.2d 249 (2007).

Plaintiffs cite to the Johns Hopkins study noted above, several cases from foreign jurisdictions, and testimony regarding the long-established patents for magazine disconnect safeties to establish the existence and knowledge of this device. Plaintiffs argue that this evidence demonstrates that it is reasonable an intended user would expect that the removal of the magazine would render the handgun harmless. Plaintiffs note David Swan's testimony that he did

not know the handgun would fire without the magazine engaged. At a minimum, plaintiffs argue that this establishes a question of fact for the jury to determine and not simply take what Beretta says about its product over what the consumer believes.

Beretta argues that application of the consumer expectation test must lead to a finding that the handgun was not unreasonably dangerous. Beretta highlights that it is important to consider the nature and function of the product in addition to determining the ordinary consumer and how the product performed under this test. *Taylor v. Gerry's Ridgewood, Inc.*, 141 Ill.App.3d 780, 784, 95 Ill.Dec. 895, 490 N.E.2d 987 (1986). Beretta first argues that the ordinary consumer of the handgun is not, as plaintiffs assert, a 13-year-old child, but an adult who can better understand the dangers and consequences of handling a firearm.

Beretta asserts that a firearm has been considered an "instrument of death" by the courts and its basic function is purely to discharge a projectile when the trigger is pulled. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. Experts for both parties testified that the function of a handgun is not to be a toy, but simply to fire bullets. Accordingly, Beretta concludes that plaintiffs' argument that the presence of a safety on a firearm alters its function.

With respect to the third consideration in the consumer expectation test, Beretta argues that *Taylor* is on point and controlling. In *Taylor*, the adult gun owner and friends had been drinking for hours and playing Russian roulette with his newly ***580** purchased revolver while it was unloaded. When preparing to leave, the owner reloaded the revolver and

placed it on the table telling everyone it was loaded. One friend apparently did not hear this warning, picked up the gun and shot and killed another friend. *Taylor*, 141 Ill.App.3d at 781-82, 95 Ill.Dec. 895, 490 N.E.2d 987.

The estate of the friend who was killed filed a strict liability claim against the manufacturer of the revolver, alleging that the double-action trigger was unreasonably dangerous and that it should have had a manual or automatic safety. The *Taylor* court affirmed the trial court's summary judgment order. The court noted that a manufacturer is not under a duty to design a product that is incapable of preventing injury or include safety features to foreclose any harm to its user. The court found that the plaintiff failed to prove the revolver was defective and that the revolver performed as designed. *Taylor*, 141 Ill.App.3d at 784-85, 95 Ill.Dec. 895, 490 N.E.2d 987.

Beretta asserts that as in *Taylor*, and similar cases following *Taylor*, the handgun performed as expected given its nature and function. As in these cases, Billy was playing with the handgun and it did what it was supposed to, discharging a bullet. Beretta repeatedly highlights the language in *Taylor* that "[o]nly a defective person would fail to realize the obvious dangers associated with these actions." *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987.

Plaintiffs respond that the *Taylor* court made those comments in the context of a situation where grown men had been drinking heavily and playing with a firearm, not a 13-year-old boy simply playing with a gun. We agree with plaintiffs that the instant scenario is distinguishable. We would be remiss if we did not further note our belief that utilizing this lan-

guage is inflammatory and inappropriate in this case. The duty of zealous advocacy does not require counsel to ignore common decency. This case is clearly distinguishable from *Taylor* and involves the tragic loss of a young boy and obvious damage to Josh's family and friends, as well as to Billy, David, and the Swan family. Testimony was received on the disruptive force this has been to all those involved and repeatedly labeling a 13-year-old boy as defective is not only unnecessary, but sad. We note, however, even if we were to accept Beretta's assessment of Billy as defective, it would strengthen the argument in favor of application of the *Hagan* case and allowing the case to go forward as a matter of public policy.

Furthermore, this language is entirely unnecessary considering Beretta's final argument that the handgun was purchased by David and used for law enforcement purposes. This particular model was designed and marketed by Beretta for military and police use. Beretta notes that testimony indicated that the handgun operated properly every time David used it and there had not been any reports of widespread defects of this handgun model. The Cook County Department of Corrections found it to be a safe and reliable firearm suitable for use as a duty pistol. Therefore, the record supports Beretta's conclusion that the handgun performed as expected and was not unreasonably dangerous and summary judgment was proper under the consumer expectation test.

2. Risk-Utility Test

Under the risk-utility test, a plaintiff may establish a defective-design claim " 'by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.' " *581 *Hansen*, 198 Ill.2d at 433, 261 Ill.Dec. 744, 764 N.E.2d 35, quoting *Lamkin*, 138 Ill.2d at 529, 150 Ill.Dec. 562, 563 N.E.2d 449. Under *Calles*, accepted factors to be considered when engaging in a risk-utility analysis are:

" '(1) The usefulness and desirability of the product-its utility to the user and to the public as a whole.

(2) The safety aspects of the product-the likelihood that it will cause injury, and the probable seriousness of the injury.

(3) The availability of a substitute product which would meet the same need and not be as unsafe.

(4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.

(5) The user's ability to avoid danger by the exercise of care in the use of the product.

(6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.

(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.' " *Calles*, 224 Ill.2d at 264-65, 309 Ill.Dec. 383, 864 N.E.2d 249, quoting J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837-38 (1973).

The *Calles* court also provided four factors to be considered with respect to the utility of a product. These factors are: the appearance and aesthetic attractiveness of the product; the utility for multiple uses; the convenience and extent of use without harm resulting from the product; and the collateral safety of a feature other than the one causing harm to the plaintiff. *Calles*, 224 Ill.2d at 265-66, 309 Ill.Dec. 383, 864 N.E.2d 249, citing American Law of Products Liability 3d § 28:19, at 28-30 through 28-31 (1997).

Plaintiffs argue that they not only showed that a safer alternative design existed, but that Beretta had manufactured such firearms at an admittedly marginal increased cost. Furthermore, Beretta's expert stated that there was no documentation available that the magazine disconnect safety would make the handgun more dangerous. Therefore, plaintiffs conclude that Beretta could have easily and cost-effectively equipped the handgun in a safer manner, but did not and as a result it was unreasonably dangerous.

Beretta claims that *Calles* upheld the "general rule" that manufacturers will not be held liable for harm resulting from a danger that is open and obvious to the typical user. *Calles*, 224 Ill.2d at 262-63, 309

Ill.Dec. 383, 864 N.E.2d 249. However, the *Calles* court specifically rejected this general rule, citing to Illinois and foreign cases rejecting such a rule and the policy reasons supporting these findings. *Calles*, 224 Ill.2d at 263, 309 Ill.Dec. 383, 864 N.E.2d 249. The *Calles* court continued to state that the open and obvious nature of the danger involved is an important factor in the risk-utility analysis, but "[a] *per se* rule would also frustrate the policy of preventing future harm which is at the heart of strict liability law." *Calles*, 224 Ill.2d at 263, 309 Ill.Dec. 383, 864 N.E.2d 249.

In any event, Beretta argues that under the risk-utility test, the product still could not be found unreasonably dangerous. While not *per se* rules, the open and obvious danger of firearms and the intended user, military and police personnel, are both important factors in the calculus under *Calles*. Experts for all parties agreed ***582** that most police officers specifically refuse to utilize a magazine disconnect safety for fear of not being able to utilize their firearm when needed the most. Beretta argues that the testimony of several experts indicated that plaintiffs' proposed magazine disconnect safety would undermine the utility of the handgun as a law enforcement weapon. Beretta highlights witness testimony that over 20 years of requests for firearms from law enforcement agencies have overwhelmingly included specific requests that a magazine disconnect not be incorporated.

Beretta argues that the testimony of several experts indicated that plaintiffs' proposed magazine disconnect safety would undermine the utility of the handgun as a law enforcement weapon. In addition, Beretta points out the additional safety features that

were included on the handgun. Further, with proper storage and handling of the handgun and adequate training, the handgun is not unreasonably dangerous. While, as discussed below, it is arguable that a suitable warning was not provided regarding the dangers involved in handling the handgun, that factor does not outweigh the other factors under *Calles* and the particular needs of police officers and the military. Accordingly, summary judgment was proper on this count under the risk-utility test.

D. Plaintiffs' Failure to Warn Claim

Plaintiffs also argue that the trial court erred by finding that Beretta did not have a duty to warn because of the open and obvious danger presented by the handgun. Plaintiffs again assert that it was reasonable for Billy to believe that the handgun was unloaded and inoperable when he removed the magazine. Plaintiffs assert that an ordinary person would believe the same and that Beretta had a duty to warn based on the level of awareness of an ordinary person. *Sollami v. Eaton*, 201 Ill.2d 1, 7, 265 Ill.Dec. 177, 772 N.E.2d 215 (2002).

Plaintiffs argue that this reasonable belief also removes the risk of the handgun as an open and obvious danger. *Miller v. Rinker Boat Co.*, 352 Ill.App.3d 648, 666, 287 Ill.Dec. 416, 815 N.E.2d 1219 (2004). A manufacturer must provide a warning for a product with dangerous propensities when the seller has greater knowledge of the risk of harm from the product and knows that harm will occur to the buyer absent a warning. *Bates v. Richland Sales Corp.*, 346 Ill.App.3d 223, 232-33, 281 Ill.Dec. 356, 803 N.E.2d 977 (2004). Plaintiffs argue that the warnings provided by Beretta were insufficient. Plaintiffs cite to

testimony that the chamber loaded indicator was hard to see and to the lack of any warning on the handgun that the chamber may be loaded without the magazine engaged. Plaintiffs argue again that foreseeability is the key consideration, without citation to authority for this issue, and that it was clearly proven by the facts of this case.

Beretta responds that summary judgment is appropriate on a failure to warn claim where the party failed to read product warnings. *Kane v. R.D. Werner Co.*, 275 Ill.App.3d 1035, 1037, 212 Ill.Dec. 342, 657 N.E.2d 37 (1995). Beretta argues that Billy testified that he did not read any of the repeated and explicit warnings provided in the owner's manual. Secondly, it argues that no duty to warn exists where the danger involved is open and obvious. *Sollami v. Eaton*, 201 Ill.2d 1, 7, 265 Ill.Dec. 177, 772 N.E.2d 215 (2002). As noted above, the danger of pulling the trigger of a firearm has been found to be open and obvious.

Beretta again cites to *Taylor*, which also involved a failure to warn claim. The *Taylor* court found that the potential danger of *583 pulling a trigger on a firearm is open and obvious. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. Beretta also cites to Billy's testimony that he knew he was handling a firearm with the potential to hurt or kill a human being. Therefore, Beretta concludes that the danger was open and obvious, and despite its extensive warnings contained in the owner's manual, Billy recklessly pulled the trigger on the handgun.

Kane does stand for the proposition Beretta claims, however. Its finding was qualified by the court's noting that, if the " 'nature of the alleged inadequacy is

such that it prevents [the party] from reading [the warning],' " a failure to warn claim may stand. *Kane*, 275 Ill.App.3d at 1037, 212 Ill.Dec. 342, 657 N.E.2d 37, quoting *E.R. Squibb & Sons, Inc. v. Cox*, 477 So.2d 963, 971 (Ala.1985). Plaintiffs provide several ways that Beretta failed to warn of the danger the handgun would fire without the magazine engaged. Plaintiffs claim the chamber loaded indicator should have been larger, the manual should have provided better warnings, and additional warnings could have been written on the handgun itself.

Interestingly, plaintiffs argue that *Taylor* was "of course not a warning issue case." However, the *Taylor* court specifically upheld the dismissal of a count sounding in negligence and alleging the revolver lacked adequate safeguards and warnings. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. The *Taylor* court found that the manufacturer's warning to read the instruction manual before use and the warnings provided in the manual were extensive and adequate. Both parties also fail to note that the *Taylor* court specifically stated that rollmarked into the steel barrel of the revolver at question was a warning to read the instruction manual before use. *Taylor*, 141 Ill.App.3d at 785, 95 Ill.Dec. 895, 490 N.E.2d 987. Because of this, the *Taylor* court concluded that the warning was communicated and the manual contained specific details that, if followed, the shooting would not have occurred.

In this case, the first line of the manual reads in bold and enlarged font "Caution: Read this manual carefully before handling and loading the pistol." As noted above, the manual repeatedly warns the user to make sure the cartridge chamber is empty when

storing the firearm and provides step-by-step instructions on how to accomplish this. The manual clearly reads that removing the magazine does not clear a loaded chamber. However, the manual does not contain any notation or warning whether or not a handgun may fire the chambered bullet when the magazine is removed. Thus, the holding in *Kane* is not helpful to Beretta because even if Billy had read the entire manual, he would not have been warned that removing the magazine does not mean the handgun will not discharge a bullet.

Beretta clearly has greater knowledge of the danger of the handgun than the typical user. The nature of the inadequacy in this case was that a user was not pointed to a warning in any event. Plaintiffs provided evidence that over a third of adults questioned in the Johns Hopkins study either believed that a gun would not fire with its magazine removed or did not know either way. In fact, an experienced user such as David, a trained police officer, did not know that the firearm may fire a bullet with the magazine removed. Therefore, plaintiffs' failure to warn claim presented a question of fact and should have survived summary judgment to determine if Beretta's warnings were sufficient.

E. Protection of Lawful Commerce in Arms Act

Finally, Beretta asserts that this cause of action must be immediately dismissed ***584** pursuant to the PLCAA. Beretta argues that the PLCAA, enacted on October 26, 2005, two months after the trial court granted summary judgment for Beretta, prohibits civil suits against manufacturers, importers, distributors, and dealers of firearms for harms caused by criminal or unlawful third party misuse of fire-

arms that function properly as designed and intended. Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. §§ 7901(a)(3), (b)(1)). Beretta argues that the PLCAA retroactively prohibits civil suits such as plaintiffs' under section 7902(b) (Pub.L. 109-12, 119 Stat. 2095, 2096 (2005)) (adding 15 U.S.C. § 7902(b)) and that this court must apply the law as it exists at appeal unless doing so would interfere with a vested right (*Caveney v. Bower*, 207 Ill.2d 82, 85, 278 Ill.Dec. 1, 797 N.E.2d 596 (2003)).

With the PLCAA, Congress sought to protect the gun industry from ruin due to lawsuits under "theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bone fide expansion of the common law" to be possibly sustained by a "maverick judicial officer or petit jury." Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. § 7901(a)(7)). Congress also found that these "qualified civil liability actions" threatened the important principles of federalism, state sovereignty and the separation of powers doctrine. Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. § 7901(a)(8)). Section 7903(5)(A) defines a "qualified civil liability action" as "a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages * * * resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(5)(A)). "Unlawful misuse" is defined as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(9)).

Beretta states that it is unchallenged that it is a manufacturer of guns under sections 7903(2) & (5)(A) of the PLCAA. Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. §§ 7903(2) & (5)(A)). The handgun is a "firearm" and a "qualified product" under the PLCAA. Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(4)). Therefore, Beretta concludes that because Billy was adjudicated a delinquent for involuntary manslaughter and reckless discharge of a firearm, he unlawfully misused the handgun and the action must be dismissed under section 7902(b).

Plaintiffs argue that the PLCAA does not apply to this case. Plaintiffs assert that the target of the PLCAA was actions brought by states, municipalities, interest groups and others attempting to force the gun industry to pay for the crimes of third parties under novel theories. Pub.L. 109-12, 119 Stat. 2095 (2005) (adding 15 U.S.C. §§ 7901(a)(3), (a)(7), (a)(8)). Therefore, an accidental shooting like Billy's that, plaintiffs argue, could have been avoided with additional safety features and proper warnings was not Congress's intended target. Furthermore, plaintiffs argue that their cause of action fits within the exceptions to qualified civil liability actions provided by the PLCAA. The relevant exceptions to the PLCAA are as follows:

> "(ii) an action brought against a seller for negligent entrustment or negligence per se;
>
> * * *
>
> *585 (iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. §§ 7903(5)(A)(ii), (5)(A)(iv), (5)(A)(v)).

Plaintiffs assert that their claims meet the exceptions for negligence and breach of warranty under sections 7903(5)(A)(ii) and 7903(5)(A)(iv) and the exception for actions based on defect or design under section 7903(5)(A)(v). Plaintiffs argue that they overcame the limitations on exception 5(A)(v) for volitional acts that constitute criminal offenses because Billy did not intend to shoot and kill Josh. Plaintiffs argue that Congress's use of " criminal offense" intended the limitation to criminal actions with accompanying *mens rea* and not reckless actions like Billy's. Plaintiffs argue that this court's Rule 23 order affirming the adjudication of delinquency was improperly utilized to establish the criminality of Billy's behavior and that the evidence establishing this is incomplete and not of record. Plaintiffs also assert that their claims against Beretta resulted from the product's condition. Therefore, plaintiffs conclude that Billy's actions were not the sole cause of harm and not covered by the PLCAA.

Plaintiffs finally assert that the PLCAA is unconstitutional because it violates the tenth amendment. Plaintiffs argue that the United States Supreme

Court has clearly stated that the United States Constitution does not grant Congress authority to direct the action of state governments. Rather, Congress may only enact generally applicable laws requiring or prohibiting certain acts and may not command the states to require or prohibit those acts. *New York v. United States*, 505 U.S. 144, 165-66, 178-79, 112 S.Ct. 2408, 2422-23, 2429-30, 120 L.Ed.2d 120, 143-44, 152-53 (1992). Plaintiffs claim that Congress's command to state courts to immediately dismiss qualified civil actions violates the tenth amendment.

Beretta responds that this appeal only involves plaintiffs' claims sounding in strict liability; thus, the negligence and warranty exceptions are irrelevant. Beretta also contends that plaintiffs failed to show that the handgun was used as intended or in a reasonably foreseeable manner and not in a manner that would constitute a criminal offense as required by the exception under section 7903(5)(A)(v). Beretta argues that it was proven that Billy's act in purposefully pulling the trigger was a volitional act that solely caused the harm and was properly found to be a criminal act. Beretta asserts that plaintiffs have tried to avoid this conclusion with meaningless semantics.

Beretta states that Congress repeatedly made clear its intent that the gun industry not be liable for harm caused by criminal and unlawful misuse of its products. Pub.L. 109-12, 119 Stat. 2095 through 2097 (2005) (adding 15 U.S.C. §§ 7901(a)(3) through (a)(5), (a)(7), (a)(8), 7903(5)(A)). Beretta argues that plaintiffs incorrectly claim that the PLCAA does not apply because Billy's conduct was not the "sole cause" of the harm under section 7901(b)(1). Beretta argues that the language of section 7903(5)(A)(v) is

conclusive that if the act in question is found criminal, "such act shall be considered the sole proximate ***586** cause of any resulting death, personal injuries, or property damage." Pub.L. 109-12, 119 Stat. 2095, 2097 (2005) (adding 15 U.S.C. § 7903(5)(A)(v)).

First, we agree with Beretta that plaintiffs have confused Congress's direct regulation and preemption of state law with commandeering state functions. Congress, Beretta correctly asserts, simply established a new federal standard that governs claims against the gun industry, preempting conflicting state tort law, a common action. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571, 116 S.Ct. 1589, 1596-97, 134 L.Ed.2d 809, 823-24 (1996). The PLCAA has been examined by the United States District Courts for the Eastern District of New York and the Central District of California in the context of nuisance claims against gun manufacturers. *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 266-67 (E.D.N.Y.2005); *Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274 (C.D.Cal.2006).

While both of these courts are federal district courts in foreign jurisdictions, their reasoning is sound and we follow these decisions on the constitutional issues. Both of these decisions included detailed examinations of the constitutionality of the PLCAA, including thorough reviews of the legislative history of the statute. In both cases, the courts found that, though there are differing opinions supporting the reasons to protect the gun industry, Congress cited proper support to utilize the commerce clause and the PLCAA was constitutional. *City of New York*, 401 F.Supp.2d at 271-97; *Ileto*, 421 F.Supp.2d at 1298-1304.

Both courts examined whether the PLCAA violated the due process or equal protection clause and whether it was a bill of attainder. Both courts found no violation in these areas, principally from the fact that one does not have a vested right in a lawsuit until a final, unreviewable judgment has been reached. *City of New York*, 401 F.Supp.2d at 271-97; *Ileto*, 421 F.Supp.2d at 1298-1304. With respect to the tenth amendment, the *City of New York* court simply stated there was no violation because Congress is not commandeering the states by means of the Act. *City of New York*, 401 F.Supp.2d at 294. Beretta properly notes that the PLCAA does not compel states to regulate anything or enact any law. The PLCAA simply establishes a federal standard for claims against the gun industry.

It is clear from the PLCAA and legislative history that plaintiffs correctly assert that Congress was primarily concerned with novel nuisance cases like *Ileto* and *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004). However, based on the plain language of the statute, plaintiffs must show they fall within the exceptions to avoid the provisions of the Act. Plaintiffs failed to support their claim that exceptions under section 7903(5)(A)(ii) for negligent entrustment or negligence *per se* and section 7903(5)(A)(iv) for breach of contract or warranty in this case. Therefore, the exception under section 7903(5)(A)(v), which allows for a claim alleging a defect in design or manufacturing, absent a volitional criminal act, is the only applicable exception to this case.

Beretta argues that Billy's testimony and the delinquency adjudication prove that the gun was discharged by a volitional act that constituted a crimi-

nal offense. However, as we have held above, plaintiffs have provided evidence that Billy's actions were not unlawful. While we look at the delinquency adjudication deferentially, it is not the law of this case and not the result of proceedings subject to the protections of the sixth amendment. Whether Billy's act *587 was volitional or whether he understood the ramifications of his conduct to support summary judgment or affording compensation to victims as *Hagan* argues for, is a question for the trier of fact.

We do not have the record of those proceedings before us and do not know the evidence that was presented. We do have the evidence plaintiff has presented in this case supporting a finding that Billy's actions were accidental. Whether Billy's actions were criminal or unlawful is a question of fact for the finder of fact based on all the evidence. If Billy's actions were criminal, the PLCAA would foreclose plaintiffs' claims against Beretta. However, if Billy's actions were found to be purely accidental and not unlawful or criminal, the exception under section 7903(5)(A)(v) would apply and the PLCAA would not preclude plaintiffs' claims against Beretta.

III. CONCLUSION

For the foregoing reasons, we reverse in part and affirm in part the decision of the trial court and remand the matter for further proceedings consistent with this opinion. We note that Sheahan raised sections 2-109, 2-204, 2-201 and 2-202 of the Local Governmental and Governmental Employees Tort Immunity Act as affirmative defenses to the complaint. 745 ILCS 10/2-109, 2-201, 2-202, 2-204 (West 2004). The trial court did not address this issue and our finding that Sheahan is liable under the principle of

respondeat superior does not end the analysis. The existence of a duty and the existence of an immunity are distinct issues that must be analyzed separately. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill.2d 484, 490, 256 Ill.Dec. 848, 752 N.E.2d 1090 (2001), citing *Barnett v. Zion Park District*, 171 Ill.2d 378, 388, 216 Ill.Dec. 550, 665 N.E.2d 808 (1996).

Affirmed in part and reversed in part, remanded for a new trial.

Presiding Justice QUINN, and Justice CAMPBELL, concur.

APPENDIX C
Order Denying Rehearing (May 26, 2009)

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

May 26, 2009

Mr. Adam Simon
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Chicago, IL 60601

No. 105789 - Hector Adames, Jr., et al., etc.,
105851 appellees, v. Michael F. Sheahan, etc.,
Cons. et al., appellants.
Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on June 30, 2009.

Kilbride, J., took no part.

APPENDIX D
Order Granting Defendant Berretta U.S.A. Corp.'s Motion for Summary Judgment on Counts V, VIII, XI, XVII, XX, XXIII, XXVI, and XXXII of Plaintiff's Third Amended Complaint (Aug. 23, 2005)

Circuit Court of Illinois,
County Department Law Division.
Cook County
Hector ADAMES, Jr. and Rosalia Diaz, as Co-Special Administrator of the Estate of Joshua Adames, Deceased, Plaintiff,
v.
David SWANN, Michael F. Sheahan, in his official capacity as Cook County Sheriff, Beretta U.S.A. Corp., and Chicago Ridge Gunshop and Range, Inc., Defendants.
No. 01 L 05894.
August 23, 2005.

Order

Carol Pearce McCarthy, Judge.
This cause coming to be heard on Defendant Beretta U.S.A. Corp's Motion for Summary Judgment on Counts V, VIII, XI, XVII, XX, XXIII, XXVI, and XXXII of Plaintiff's Third Amended Complaint, the Court being fully advised of all premises states as follows:

1. Summary judgment is appropriate where the record taken in light most favorable to the non-movant, shows no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS, Section 5/2-1005(c) (West 2002).

2. Pleadings, depositions, admissions and affidavits must be strictly construed against the movant and liberally in favor of opponent If material facts are in dispute or reasonable persons might draw different inferences from undisputed facts,

3. Summary judgment is appropriate where clear and free from doubt. It is encouraged as an aid in the expeditious disposition of a lawsuit. *Gilbert v. Sycamore Munic. Hosp.*, 156 Ill.2d 511 (1993).

WHEREFORE, based upon the record herein and for all the reasons stated by Defendant Beretta and all relevant law, Defendant Berretta U.S.A. Corp's Motion for Summary Judgment is granted in its entirety.

ENTERED

Judge Carol Pearce McCarthy

Date ____

APPENDIX E
Constitutional Provisions

U.S. CONST. ART. I § 8

Constitution of the United States
Article I. The Congress
Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U.S. CONST. AMEND. X

Constitution of the United States
Amendment X: Reserved Powers

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F
15 U.S.C. §§ 7901-7903

United States Code Annotated
Title 15. Commerce and Trade
PROTECTION OF LAWFUL COMMERCE IN ARMS

§ 7901. Findings; purposes

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun

Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.

Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States

Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

§ 7903. Definitions

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or

ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record

required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term " negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

MS (4)

No. 09-253

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HECTOR ADAMES, JR., *et al.*,
Petitioners,

v.

BERETTA U.S.A. CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether review is merited with respect to Section 7903(5)(A)(iii) of the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA" or the "Act"), where any issue relating to that section was not preserved for review and, in any event, the section is not applicable to this case.

2. Whether review is merited where the Illinois Supreme Court correctly applied the settled standard for review of federal statutes under the Tenth Amendment, and there is no conflict among courts on this issue.

3. Whether review is merited when, contrary to Petitioners' contentions, the PLCAA neither favors statutory claims over common law claims nor dictates which branch of state government is the authoritative expositor of state law.

4. Whether review is merited where the Illinois Supreme Court applied the plain and unambiguous language of Section 7903(5)(A)(v) of the PLCAA to the facts of this case in concluding that Petitioners' tort claims were barred by the PLCAA.

CORPORATE DISCLOSURE STATEMENT

Beretta U.S.A. Corp. is majority owned by Beretta Holding S.p.A. There are no publicly held companies that own ten percent or more of Beretta U.S.A. Corp.'s stock.

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HECTOR ADAMES, JR., *et al.*,
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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

Respondent Beretta U.S.A. Corp. respectfully requests that the Court deny Petitioners' petition for a writ of certiorari to the Illinois Supreme Court for four reasons:

First, contrary to Petitioners' contention, Section 7903(5)(A)(iii) of the PLCAA does not provide a basis for granting review because that section was not raised below and does not apply to this case.

Second, contrary to Petitioners' contention, there is no conflict between the Illinois Supreme Court and the precedent of this Court or the circuits regarding the standard for resolving Petitioners' Tenth Amendment challenge to the PLCAA.

Third, the PLCAA sets a new single federal standard that governs what claims may and may not be brought against firearm manufacturers and sellers, and the Act applies it equally to preempt conflicting state law claims, whether those claims are based on common law or state statute

Fourth, the Illinois Supreme Court correctly applied the plain and unambiguous language of Section 7903(5)(A)(v) of the PLCAA to the facts of this case in concluding that Petitioners' tort claim was barred by the Act because "the discharge of the [firearm] was caused by a volitional act that constituted a criminal offense."

In short, Petitioners have failed to present a compelling reason for certiorari.

INTRODUCTION

Congress enacted the PLCAA to address the wave of lawsuits brought in recent years by municipalities and individuals against manufacturers and sellers of firearms for harm resulting from the criminal misuse of their products, citing the burdens to interstate and foreign commerce imposed by such suits. *See* 15 U.S.C. §§ 7901(a)(3), (5); §§ 7901(b)(l), (4). The Act requires courts to immediately dismiss any "qualified civil liability action" pending on the date of the PLCAA's enactment. *Id.* at § 7902(b). Petitioners are suing Beretta U.S.A. Corp., a manufacturer of firearms, for wrongful death damages resulting from the criminal and/or unlawful misuse of the subject Beretta pistol by a third party. Therefore, Petitioners' case falls squarely within the definition of a prohibited "qualified civil liability action" under Section 7903(5)(A).

To avoid the clear application of the Act to their case, Petitioners were required to establish that their action fit within one of the exceptions set forth in the Act. Through the exceptions in Sections 7903(5)(A)(i)-(vi), Congress set forth the grounds on which any plaintiff—private or public—may bring or maintain a lawsuit against a firearm manufacturer, distributor or retailer based on a third party's criminal acts. Some of the claims preserved in the six exceptions to a "qualified civil liability action" are common law claims, *see, e.g.*, § 7903(5)(A)(iv) (breach of contract or warranty), and some are statute-based, *see, e.g.*, § 7903(5)(A)(i) (violation of 18 U.S.C. § 924(h) or comparable state felony law).

Petitioners sought to circumvent the Act based solely on the product liability exception (15 U.S.C. § 7903(5)(A)(v)), which preserves from dismissal actions "for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." 15 U.S.C. § 7903(5)(A)(v). However, because the third party's injury-causing actions in this case were both volitional and criminal in nature, the Illinois Supreme Court correctly determined that his discharge of the Beretta pistol was the "sole proximate cause" of Petitioners' damages, thereby requiring an immediate dismissal of Petitioners' action.

REASONS FOR DENYING THE WRIT

This case does not qualify for Supreme Court review. The main thrust of Petitioners' argument is that

certiorari is warranted for this Court to review the predicate exception of the PLCAA, Section 7903(5)(A)(iii). However, that section of the Act was not argued as being applicable to this case below and it has no application to the facts of this case in any event. Petitioners' argument that this Court should grant review to evaluate Petitioners' Tenth Amendment challenge to the Act is similarly lacking in merit. In holding that the PLCAA does not run afoul of the Tenth Amendment, the Illinois Supreme Court correctly applied the settled legal standard and did not establish a new principle of law or create any conflict with decisions of this Court or other courts. Finally, review is not warranted to determine whether the Illinois Supreme Court erred in applying the law to the facts where the Court simply applied the plain and unambiguous language of Section 7903(5)(A)(v) of the PLCAA to the facts of this case in concluding that Petitioners' tort claims were barred by the Act.

FACTUAL BACKGROUND

On May 5, 2001, Billy Swann, then 13 years old, went into his parents' bedroom, against house rules, and retrieved his father's Beretta Model 92 service weapon from a gun case containing two other firearms which was kept in the closet. Petitioners' Appendix ("Pet. App.") 3a. Billy's father was a Cook County Corrections officer certified to carry the subject Beretta pistol as his duty pistol.[1] Pet. App. 6a.

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[1] The subject Beretta Model 92FS pistol is favored by law enforcement agencies and military organizations. Pet. App. 10a. It has a number of safety features, but does not include a feature advanced by Petitioners below—a magazine disconnect safety—because it is eschewed by the vast majority of law

Though Billy knew his parents would disapprove, he nonetheless began to play with the pistol, loading and unloading the available ammunition in the pistol's magazine. *Id.* at 3-4a. Several times, Billy loaded and unloaded the magazine with a live cartridge he would eject from the pistol by manually moving the slide rearward. *Id.* Throughout this process, Billy repeatedly manipulated the magazine release button to remove the loaded magazine. *Id.* He knew that the pistol was loaded when the magazine was inserted in the pistol but claimed to believe it was unloaded when the magazine was removed. *Id.* at 4a. Billy had not read the Instruction Manual, even though the manual contained numerous instructions on safe handling and "explicit step-by-step instructions on how to safely and completely unload" the pistol. *Id.* at 4a, 10a, 56-57a.

Billy carried the Beretta pistol and another of his father's firearms downstairs and showed them to a friend who had come over to the house. *Id.* When Joshua Adames arrived about 10 minutes later, Billy showed him the firearms as well. Billy and Joshua began to wrestle for the Beretta pistol. Billy depressed the magazine release button and removed the magazine. He then pointed the pistol at Joshua and deliberately pulled the trigger, thereby discharging the live cartridge of ammunition in the chamber. *Id.* at 3-4a, 39a, 42a, and 51a. Joshua died from injuries sustained in the shooting.

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enforcement personnel who wish to be able to fire a chambered cartridge even if the magazine is inadvertently released. Pet. App. 10a, 12a, 56a. Beretta has found that there is little market demand for a law enforcement pistol equipped with a magazine disconnect safety and most agencies either demand or otherwise express a strong preference for a pistol without such a feature. *Id.* at 12a.

In a subsequent state juvenile court proceeding, Billy was adjudicated a delinquent based upon the court's finding that he committed involuntary manslaughter (720 ILCS 5/9-3(a)[West 2000] Resp. App. 1a) and reckless discharge of a firearm (720 ILCS 5/24-1.5(a)[West 2000] Resp. App. 1a), both criminal offenses under the Illinois Criminal Code. Pet. App. 5a. The juvenile court's finding was affirmed on appeal by the Illinois Court of Appeal in an unpublished order. Pet. App. 37a. *See In re: W.S. (People v. W.S.)* (Nov. 26, 2003), No. 1-02-1170 [First Judicial District, Fifth Div.](Resp. App. 5-16a),[2] *pet. for leave to appeal denied*, 208 Ill.2d 538, 809 N.E.2d 1286 (2004).

PROCEEDINGS BELOW

Petitioners filed a wrongful death and survival action in Cook County Circuit Court naming Billy's father, David Swan, Cook County Sheriff Michael F. Sheahan, a local firearms retailer, Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A.

Following extensive discovery, Respondent filed a motion for summary judgment seeking dismissal of Petitioners' product liability and breach of warranty claims. The trial court granted Respondent's motion in its entirety on August 23, 2005, "based on the record" and "for all the reasons stated by Defendant Beretta and all relevant law." Pet. App. 15-16a, 60a, and 103-04a.

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[2] Below, Petitioners argued that the Illinois Supreme Court could not consider the unpublished order affirming Billy's delinquency adjudication. However, as that court made clear, it could properly take judicial notice of the unpublished order without running afoul of Illinois Supreme Court Rule 23. Pet. App. 37-38a. *See* Resp. App. 2-4a.

Several months later, Congress enacted the PLCAA. Section 7902(b) of the Act requires an immediate dismissal of any "qualified civil liability action that is pending on the date of enactment [enacted Oct. 26, 2005]." 15 U.S.C. § 7902(b).

Petitioners timely appealed the trial court's dismissal of their design defect and failure to warn claims. Pet. App. 33a. In its briefing before the appellate court, Beretta argued that the PLCAA required dismissal of Petitioners' pending action. The appellate court affirmed in part and reversed in part. As it relates to the issues raised here, the appellate court found that the Beretta pistol was not unreasonably dangerous and therefore not defective in its design under either Illinois' consumer expectations test or risk-utility test. Pet. App. 85a, 89a. However, the appellate court concluded a question of fact existed as to whether Beretta's warnings were sufficient. *Id.* at 92a. As for the PLCAA, the appellate court concluded without analysis that the Act applied to Petitioners' action and that only one exception—the exception found in Section 7903(5)(A)(v)—was potentially applicable. Pet. App. 36a, 98a. The appellate court concluded that a question of fact existed as to whether Billy's conduct was volitional or "constituted a criminal offense" sufficient to preclude application of the statutory exception, thereby requiring dismissal of the appeal and the underlying action. Pet. App. at 98-99a.

In an unanimous decision, the Illinois Supreme Court reversed the appellate court and concluded that the PLCAA applied to Petitioners' claims against Beretta and that those claims fit squarely within the definition of a "qualified civil liability action" under the Act. Pet. App. 39a ("Accordingly, we find that

plaintiffs' lawsuit is a qualified civil liability action as defined in the PLCAA."). The court then concluded that the product liability exception did not apply because Billy Swan's conduct was volitional and that it constituted a criminal offense. Pet. App. 41-43a. Therefore, under the plain language of the product liability exception, the court determined that Billy's actions became the "sole proximate cause" of Joshua's death. Without the product liability exception to revive Petitioners' qualified civil liability action, it was properly dismissed. Pet. App. 46a.

I. SECTION 7903(5)(A)(iii) OF THE PLCAA—ON WHICH THE PETITION IS BASED—HAS NO APPLICATION TO THIS CASE.

Beginning with their Questions Presented, Petitioners cite to 15 U.S.C. § 7903(5)(A)(iii)[known as the "predicate exception"] as evidence of what they argue is Congress's "anti-judicial, pro-legislative objective in enacting the PLCAA." (Petition at 3-4).[3] From there, Petitioners argue the predicate exception is "a breathtaking and unprecedented attempt to control how states make law," and, as such, provides

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[3] Section 7903(5)(A)(iii) of the Act, one of the six exceptions to a "qualified civil liability action" under Section 7903(5)(A), does not preempt "an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought . . . ." 15 U.S.C § 7903(5)(A)(iii). "This exception has become known as the 'predicate exception,' because a plaintiff not only must present a cognizable claim, he or she must allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009) (quoting *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2nd Cir. 2008), *cert. denied*, 129 S. Ct. 1579 (Mar. 9, 2009)).

a primary ground for granting their petition. Petition at 7-8. *See also* Petition at 3-4, 13, 19-21.

As is plain from the record below, however, this case has nothing whatever to do with the predicate exception.[4] In fact, Section 7903(5)(A)(iii) was not argued below as being applicable to this case and it is cited *nowhere* in the Illinois Supreme Court's decision. Rather, as found by both the Illinois Court of Appeal and the Illinois Supreme Court, the only PLCAA exception that had any possible application was th "product liability exception" embodied in Section 7903(5)(A)(v). Pet. App. 40a, 98a. Petitioners did not challenge that finding below. *Id.*

Because the predicate exception was never raised below, and has no application to this case in any event, the Illinois Supreme Court did not consider, much less decide, "an important federal question" or "an important question of federal law" relating to the predicate exception which has been preserved for this Court's review. Supreme Court Rule 10. Accordingly, the Court should reject Petitioners' ill-conceived "predicate exception" argument as completely irrelevant to the issues raised in this case.

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[4] Unlike the case below, the predicate exception has been the subject of some discussion in other cases. *See, e.g., Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2nd Cir. 2008), *cert. denied*, 129 S. Ct. 1579 (Mar. 9, 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008), *cert. denied sub nom, Lawson v. Beretta U.S.A. Corp.*, 129 S. Ct. 1579 (Mar. 9, 2009).

II. THE ILLINOIS SUPREME COURT APPLIED SETTLED TENTH AMENDMENT STANDARDS IN ITS REVIEW OF THE PLCAA.

The Illinois Supreme Court held that the PLCAA does not violate the Tenth Amendment. Because it "is a valid exercise of the federal power to regulate interstate commerce, Congress had not intruded upon an area of authority traditionally reserved to the states and does not impermissibly commandeer the states or their officials in violation of the Tenth Amendment." Pet. App. 45a.

In its analysis, the court found persuasive the holding of the Second Circuit in *City of New York v. Beretta*, 524 F.3d 384 (2nd Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (Mar. 9, 2009), a case in which a virtually identical Tenth Amendment challenge to the PLCAA was rejected. Indeed, this Court denied the City of New York's petition for a writ of certiorari in that case in which the City raised the same issues and argument asserted by Petitioners here. *City of New York, New York, et al., v. Beretta U.S.A. Corp., et al.*, 129 S. Ct. 1579; 173 L. Ed. 2d 675; 2009 U.S. LEXIS 1833; 77 U.S.L.W. 3505 (Mar. 9, 2009).

This Court's Tenth Amendment jurisprudence is entirely consistent with the approach taken by the Illinois Supreme Court in this case and the Second Circuit in *City of New York*. That jurisprudence is established in a series of recent cases, which set out the standard the Illinois Supreme Court and the Second Circuit applied. In *New York v. United States*, 505 U.S. 144, 166 (1992), the Court held: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power

directly to compel the States to require or prohibit those acts." This principle was further explained in *Printz v. United States*, 521 U.S. 898, 935 (1997), where the Court held that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program . . . [because] such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

In *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), the Court reconfirmed its approach to Tenth Amendment issues:

> In examining congressional enactments for infirmity under the Tenth Amendment, this Court has focused its attention on laws that commandeer the States and state officials in carrying out federal regulatory schemes.

Id. at 186 (citing *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992). In *McConnell*, there was no "contention that Congress has overstepped its Elections Clause power," *McConnell*, 540 U.S. at 187, just as Petitioners here make no argument that Congress's passage of the PLCAA was not authorized by the Commerce Clause.

In the Court's most recent Tenth Amendment opinion, the plaintiffs challenged the authority of the Office of the Controller of the Currency to regulate, to the exclusion of state authorities, the mortgage business of national banks, even where that business was conducted through the banks' state-licensed operating subsidiaries. *See Watters v. Wachovia Bank, N.A.*,

550 U.S. 1 (2007). In rejecting the plaintiffs' Tenth Amendment challenge, the Court held:

> As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States*, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 58, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) (per curiam). The Tenth Amendment, therefore, is not implicated here.

Id. at 22. Since the Commerce Clause authorized Congress to pass the PLCAA, "[t]he Tenth Amendment, therefore, is not implicated." *Id.* That should end the analysis.

In an effort to avoid this result, however, Petitioners attempt to manufacture a conflict with the decisions of other Circuits where none in fact exist. First, in the face of multiple constitutional challenges to the PLCAA in other actions, virtually every court has found that the Act is constitutional. *See, e.g., Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) (rejecting equal protection, takings, due process, and separation of powers challenges to the PLCAA); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172-82 (D.C. 2008) (rejecting separation of powers, due process, and takings challenges to the constitutionality of the Act). Indeed, Respondents are aware of only one court (a state trial court) that has ruled that the Act is unconstitutional (on other grounds), and even that court rejected the very Tenth Amendment argument Petitioners make here. *See*

City of Gary v. Smith & Wesson Corp., Cause No. 45D05-00005-CT-00243, slip op. (Oct. 23, 2006) (rejecting Tenth Amendment challenge because PLCAA "is not commandeering" of state action), *aff'd on other grounds*, 875 N.E.2d 422 (Ind. Ct. App. 2007), *rehn'g denied sub nom., Smith & Wesson Corp. v. City of Gary*, 2008 Ind. App. LEXIS 8 (Ind. Ct. App., Jan. 9, 2008), *pet. to transfer denied*, 2009 Ind. LEXIS 12 (Ind. Sup. Ct., Jan. 12, 2009).[5]

Second, Petitioners' claim that the Illinois Supreme Court's approach conflicts with the analysis of the Fourth Circuit as expressed in *United States v. Johnson*, 114 F.3d 476 (4th Cir. 1997), the First Circuit in *United States v. Bongiorno*, 106 F.3d 1027 (1st Cir. 1997), and the Tenth Circuit in *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), is similarly mistaken. Each of those opinions reviewed and upheld the constitutionality of the Child Support Recovery Act of 1992 ("CSRA") in a manner entirely consistent with the standard applied by the Illinois Supreme Court here and the Second Circuit just before it. In *Hampshire*, the Court held: "In light of our holding that congressional enactment of the CSRA does not violate the Commerce Clause, Mr. Hampshire's Tenth Amendment argument fails." *Hampshire*, 95 F.3d at 1004.

Similarly, the Court in *Bongiorno* held that the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power. . . .

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[5] Because the Court of Appeals in *City of Gary* concluded that the PLCAA did not bar the City's suit, it did not reach the constitutional issues addressed by the trial court. *See City of Gary v. Smith & Wesson Corp*, 875 N.E.2d 422, 434-35 (Ind. Ct. App. 2007).

Inasmuch as Congress passed the CSRA pursuant to the valid exercise of such an enumerated power (the power to regulate interstate commerce), that tenet governs here." *Bongiorno*, 106 F.3d at 1033.

In *Johnson*, the Court rejected appellants' contention that the CSRA "infringe[d] on two traditional areas of state sovereignty: criminal law and family law," and that it inappropriately regulated "'states as states' by interfering with their parens patriae roles in relation to minors." *Johnson*, 114 F.3d at 480-81.

Despite this consistent body of precedent, Petitioners argue that the Illinois Supreme Court was required to go further to determine if there was interference with state sovereignty. Petitioners rely on the "three-part test" referenced in *Johnson* and set out more fully in *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981). *Hodel* in turn, relied on the Court's opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), for the requirement to examine whether a federal statute addressed "matters that are indisputably '[attributes] of state sovereignty.'" *Hodel*, 452 U.S. at 288 (quoting *National League of Cities*, 426 U.S. at 845). The Court in *Hodel* found that the Tenth Amendment was not implicated in that case because the Surface Mining Act regulated private parties rather than the "States as States." *Hodel*, 452 U.S. at 287-88. *Hodel* has since come to stand for the proposition that the Tenth Amendment bars a statute that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *See New York*, 505 U.S. at 176 (quoting *Hodel*, 452 U.S. at 288). Yet, that is the precise test applied by the Illinois Supreme Court following similar reasoning from *City of New York v.*

Beretta U.S.A. Corp., 524 F.3d 384, 396 (2nd Cir. 2008) *cert. denied*, 129 S.Ct. 1579 (Mar. 9, 2009).

Petitioners point to the *Johnson* court's analysis of whether the CSRA interfered with "traditional areas of state sovereignty," *Johnson*, 114 F.3d at 480, to support their argument that the Illinois Supreme Court improperly failed to consider this purported additional element. The "traditional government functions" analysis in *Johnson* grew out of the test enunciated in *National League of Cities*, which this Court explicitly overturned in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

In *Garcia*, this Court acknowledged that *National League of Cities* "did not explain what aspects of such [State] decisions made them such an 'undoubted attribute [of state sovereignty],' and the Court since then has remarked on the uncertain scope of the concept." *Garcia*, 469 U.S. at 548. The Court described the problems inherent in the approach Petitioners claim the Illinois Supreme Court should have followed here:

> We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally

> sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. . . . By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law.

Id. at 548-49. In light of the fact that the "traditional areas of state sovereignty" test is "unsound in principle and unworkable in practice," *id.* at 546, the Court overturned the holding of *National League of Cities* and held:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Id. at 554. Thus, to the extent Petitioners rely on an analysis of interference with "traditional governmental functions" (*see* Petition at 16), that approach is simply outdated and inapplicable in this case.

Because Petitioners have not and cannot show any genuine conflict between the standard applied by the Illinois Supreme Court and the decisions of this Court or any Circuit court, the Court should deny review.

III. THE PLCAA APPLIES EQUALLY TO ACTIONS BASED ON STATE STATUTES OR COMMON LAW AND DOES NOT DICTATE WHICH BRANCH OF STATE GOVERNMENT "IS THE AUTHORITATIVE EXPOSITOR OF STATE LAW."

Petitioners contend that the Tenth Amendment also prohibits the federal government from interfering with the structure and operation of state government, and the PLCAA violates this prohibition by dictating which branch of state government will be recognized as the "authoritative expositor" of the state's pertinent laws. Petition at 7, 13-15. This argument is premised on Section 7903(5)(A)(iii) of the PLCAA, which Petitioners' erroneously contend favors legislative enactments over judge-made law. As explained in in Section I, *supra*, Section 7903(5)(A)(iii) of the PLCAA has no application to this case. Moreover, as discussed in Section II, *supra*, Petitioners' characterization of Tenth Amendment jurisprudence is both outdated and without merit.

First, none of the cases cited by Petitioners support its novel expansion of the Tenth Amendment to Congressional enactments that neither facially nor in practice coerce the States to do anything.[6] Second,

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[6] Indeed, most of the cases cited by Petitioners do not even involve the Tenth Amendment. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (state immunity from private suit under FLSA); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (equal protection challenge); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937) (delegation of state authority to commission raised no federal constitutional issues). The issue in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), was a state's fundamental right to establish qualifications for its own governing officials, and even then, the Court recognized that "[a]s long as

Petitioners' contention that the PLCAA interferes with states' allocation of authority between their judicial and legislative branches by permitting statutory but not common law claims is premised on a fundamental misreading of the PLCAA. The Act does not favor statutory law over common law, as Petitioners contend. Indeed, the Act contains exceptions permitting specified common law claims to proceed. *See, e.g.*, 15 U.S.C. § 7903(5)(A)(iv) (breach of contract or warranty). Nor does the Act dictate which branch of state government may articulate state law.

Rather, as the Illinois Supreme Court correctly held, the PLCAA sets a new single federal standard that governs what claims may and may not be brought against firearm manufacturers and sellers—a standard that applies equally to preempt conflicting state law claims, whether those claims are based on common law or state statute. Pet. App. 44a.[7]

IV. THE ILLINOIS SUPREME COURT CORRECTLY APPLIED THE PLAIN LANGUAGE OF THE PLCAA'S PRODUCT LIABILITY EXCEPTION (15 U.S.C. § 7903(5)(A)(V)) TO THE FACTS OF THIS CASE.

Petitioners contend that the Illinois Supreme Court should have conducted an examination of the Con-

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it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.* at 460.

[7] The Illinois Supreme Court agreed with the Second Circuit in its conclusion that "[t]he PLCAA bars qualified civil liability actions, as defined in the statute. The definition of qualified civil liability action permissibly sets forth a new legal standard to be applied to all actions." *City of New York, supra*, 524 F.3d at 395-96. Accordingly, ". . . [t]he PLCAA does not merely direct the outcome of cases, but changes the applicable law . . . ." *Id.*

gressional Record to ascertain congressional intent with respect to the product liability exception of the PLCAA. Had the court done so, Petitioners argue, there would have been some record from which to conclude that Congress did not intend to preclude traditional product liability claims like those brought by Petitioners. Petition at 24-26. Petitioners further argue that the Illinois Supreme Court's application of the product liability exception is in conflict with the Act's findings and purposes. However, these arguments ignore the plain language of the Act and improperly seek to substitute Petitioners' interpretation of selected excerpts from the Congressional Record over the express statutory language contained in the final version of the Act.

"There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940). *See also Caminetti v. United States*, 242 U.S. 470, 490 (1917). The task of ascertaining the product liability exception's purpose begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). Where, as here, the statute's language is plain, it is also where the inquiry should end, as "the sole function of the courts is to enforce it according to its terms." *Caminetti, supra*, 242 U.S. at 485. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (internal citations omitted); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

The language at issue here—the text of Sections 7903(5)(A) and 7903(5)(A)(v)—clearly expresses Congress's intent with sufficient precision so that reference to legislative history is unnecessary and unwarranted.

The Act prohibits the bringing of a "qualified civil liability action" in any federal or state court, and it compels immediate dismissal of any such action "pending on the date of enactment [enacted Oct. 26, 2005] . . . ." 15 U.S.C. §§ 7902(a), (b). A "qualified civil liability action" means "a civil action . . . *brought by any person* against a manufacturer or seller of a qualified product, or trade association, for damages . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . ." 15 U.S.C. § 7903(5)(A)[emphasis added][8].

"[B]ased on the plain language of the statute," the Illinois Court of Appeal concluded without analysis that the PLCAA applied to Petitioners' case and that the product liability exception (15 U.S.C. § 7903(5)(A)(v)) was the only exception in the Act upon which they could arguably rely to avoid dismissal. Pet. App. 98a.

In its briefing before the Illinois Supreme Court, Petitioners denied that their action fit within the definition of a "qualified civil liability action" under the Act. Thus, the court undertook the task of analyzing how the PLCAA applied to Petitioners' claims

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[8] Congress's use of the phrase "any person" in Section 7903(5)(A) defining "qualified civil liability action" further supports the view that the Act is intended to preclude actions brought not only by governmental entities but by individuals as well, provided such actions for damages were the result of criminal or unlawful misuse of a qualified product. 15 U.S.C. § 7903(5)(A).

with the "relevant inquiry" being "whether the misuse of the Beretta was criminal or unlawful." Pet. App. 39a. In so doing, the court concluded that Billy's commission of involuntary manslaughter and/or reckless discharge of a firearm were both "unlawful," as that term is defined in Section 7903(9), and "criminal" as that term is used in Section 7903(5)(A). Pet. App. 36-37a (holding that both of Billy's violations of the Illinois Criminal Code satisfied the "unlawful" and/or "criminal misuse" requirements of the Act).[9] Thus, the court specifically determined that Petitioners' wrongful death action against Beretta U.S.A. Corp. was "a qualified civil liability action as defined in the PLCAA." Pet. App. 39a. On these facts, there is simply no other reasonable conclusion.

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[9] Citing selected excerpts from the Congressional Record, *amici* argue that the Act was never intended to apply to product liability suits against manufacturers arising out of "accidental" shootings. This argument completely ignores the central purpose of the Act, as expressed in its findings, purposes and express language in its substantive provisions; namely, that precluded suits are those that result from "the criminal or unlawful misuse" of a qualified product. 15 U.S.C. § 7903(5)(A). And, to the extent a product liability action is at issue, even those suits are precluded if the injury-causing discharge "was caused by a volitional act that constituted a criminal offense," because that volitional discharge then becomes "the sole proximate cause" of the resulting injury or death. 15 U.S.C. § 7903(5)(A)(v).

Here, while Joshua's death is a tragic "accident" in the broad sense, the Illinois courts, beginning with the juvenile court, found that Billy's conduct was not simply "accidental" but instead violated two Illinois Criminal Code statutes—involuntary manslaughter and reckless discharge of a firearm. These specific factual findings, which were affirmed on appeal, support the Illinois Supreme Court's conclusion that the clear language of the Act precluded Petitioners' action.

Under the Act, there are six types of actions excepted from the statutory definition of a qualified civil liability action and those actions are set forth at 15 U.S.C. §§ 7903(5)(A)(i)-(vi).

The fifth of those exceptions, the "product liability exception," exempts actions for death or physical injuries or property damage "resulting directly from a defect in design or manufacture of the product . . . ." 15 U.S.C. § 7903(5)(A)(v). However, the Act provides that even those actions are barred "where the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.* In such circumstances, "then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." *Id.* Thus, while the product liability exception can serve to exempt certain design or manufacturing defect actions, it does so only if the discharge of the product was not caused by a volitional act that constituted a criminal offense. *Id.* Without the product liability exception to save it, the Act requires Petitioners' qualified civil liability action be dismissed.

Here, of course, the Illinois Supreme Court had no trouble concluding that a number of Billy's actions—including loading and unloading the subject pistol, pointing it at Joshua and pulling the trigger—were "volitional." Pet App. 42a (". . . even if Billy did not intend to shoot Josh, Billy did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger."). Moreover, that court easily found that Billy's commission of either involuntary manslaughter (720 ILCS 5/9-3(a)) or reckless discharge of a firearm (720 ILCS 5/24-1.5(a))—both criminal offenses under the Illinois Criminal Code—"constituted a criminal offense" under the product

liability exception. Pet. App. 36-39a, 41a. Once the state court's factual findings were applied to the plain language of the Act, the conclusion was inescapable—Billy's discharge of the subject Beretta pistol "shall be considered the sole proximate cause" of Joshua's death. 15 U.S.C. § 7903(5)(A)(v). Accordingly, the plain and unambiguous language of the Act itself compelled dismissal of Petitioners' product liability claims against Respondent. 15 U.S.C. § 7902(b).

Petitioners' reliance on the Act's findings and purposes is unavailing. Nowhere does the Act limit its application to suits commenced by states or municipalities "based on theories without foundation in hundreds of years of the common law . . . ." 15 U.S.C. § 7901(a)(7). *See* Petition at 25-26. Indeed, two of the Act's express findings make no such distinction and are therefore applicable to all suits, whether brought by individuals or governmental entities.[10] *See* 15 U.S.C. §§ 7901(a)(3) and (a)(5).

Indeed, "[t]he PLCAA's stated primary purpose" is to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009)(citing 15 U.S.C. § 7901(b)(1)).

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[10] Appellate decisions construing the PLCAA thus far have included cases brought by both individuals as well as governmental entities. *See, e.g., Ileto v. Glock, Inc., supra,* (a case involving claims by individual plaintiffs against firearm manufacturer Glock, Inc.) and *City of New York, supra,* (a case brought by the City of New York, its mayor and others).

Moreover, the definition of preempted "qualified civil liability actions" expressly includes actions "resulting from the criminal or unlawful misuse" of a qualified product by a third party. 15 U.S.C. § 7903(5)(A). In light of the record evidence in this case, the Illinois Supreme Court correctly concluded that Billy's conduct constituted a "criminal or unlawful misuse of the Beretta for purposes of the PLCAA." Accordingly, because Petitioners' action below constituted a "qualified civil liability action" subject to dismissal, the Illinois Supreme Court correctly dismissed Petitioners' action against Beretta. Pet. App. 39a, 43a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

State Statutes
Illinois Criminal Code of 1961

720 ILCS 5/9-3
Involuntary Manslaughter and
Reckless Homicide.

Sec. 9-3(a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle or operating a snowmobile, all terrain vehicle, or watercraft, in which case the person commits reckless homicide. A person commits reckless homicide if he or she unintentionally kills an individual while driving a vehicle and using an incline in a roadway, such as a railroad crossing, bridge approach, or hill, to cause the vehicle to become airborne.

720 ILCS 5/24-1.5
Reckless Discharge of a Firearm.

Sec. 24-1.5(a) A person commits reckless discharge of a firearm by discharging a firearm in a reckless manner which endangers the bodily safety of an individual.

APPENDIX B

ILLINOIS SUPREME COURT RULES

Rule 23. Disposition of Cases in the Appellate Court

The decision of the Appellate Court may be expressed in one of the following forms: a full opinion, a concise written order, or a summary order conforming to the provisions of this rule. All dispositive opinions and orders shall contain the names of the judges who rendered the opinion or order. Only opinions of the court will be published.

(a) Opinions. A case may be disposed of by an opinion only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied:

(1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or

(2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

(b) Written Order. Cases which do not qualify for disposition by opinion may be disposed of by a concise written order which shall succinctly state:

(1) the germane facts;

(2) the issues and contentions of the parties when appropriate;

(3) the reasons for the decision; and

(4) the judgment of the court.

(c) Summary Order. In any case in which the panel unanimously determines that any one or more of the following dispositive circumstances exist, the

decision of the court may be made by summary order. A summary order may be utilized when:

(1) the Appellate Court lacks jurisdiction;

(2) the disposition is clearly controlled by case law precedent, statute, or rules of court;

(3) the appeal is moot;

(4) the issues involve no more than an application of well-settled rules to recurring fact situations;

(5) the opinion or findings of fact and conclusions of law of the trial court or agency adequately explain the decision;

(6) no error of law appears on the record;

(7) the trial court or agency did not abuse its discretion; or

(8) the record does not demonstrate that the decision of the trier of fact is against the manifest weight of the evidence.

When a summary order is issued it shall contain:

(i) a statement describing the nature of the case and the dispositive issues without a discussion of the facts;

(ii) a citation to controlling precedent, if any; and

(iii) the judgment of the court and a citation to one or more of the criteria under this rule which supports the judgment, e.g., "Affirmed in accordance with Supreme Court Rule 23(c)(1)."

The court may dispose of a case by summary order at any time after the case is docketed in the Appellate Court. The disposition may provide for dismissal, affirmance, remand, reversal or any combination thereof as appropriate to the case. A summary order may be entered after a dispositive issue has been fully briefed, or if the issue has been raised by motion of a party or by the court, *sua sponte*, after expiration of the time for filing a response to the motion or rule to show cause issued by the court.

(d) Captions. All opinions and orders entered under this rule shall bear a caption substantially conforming to the requirements of Rule 330.

(e) Effect of Orders. An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case. When cited for these purposes, a copy of the order shall be furnished to all other counsel and the court.

(f) Motions to Publish. If an appeal is disposed of by order, any party may move to have the order published as an opinion. The motion shall set forth the reasons why the order satisfies the criteria for disposition as an opinion and shall be filed within 21 days of the entry of the order.

APPENDIX C

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-02-1170

In Re: W.S., a Minor,

THE PEOPLE OF THE STATE OF ILLINOIS,
Petitioner-Appellee,

v.

W.S.,
Respondent-Appellant.

Appeal from the Circuit Court of Cook County.
No. 99 JD 2815

FIFTH DIVISION
November 26, 2003

Honorable Joseph M. Claps, Judge Presiding

ORDER

Following an adjudicatory hearing, the circuit court found minor respondent W.S. delinquent based upon his commission of involuntary manslaughter and reckless discharge of a firearm. At disposition, the

trial court remanded respondent to four months in the juvenile division of the Department of Corrections. Respondent was subsequently released on home confinement and currently remains on intensive probation. Upon appeal, respondent contends that: (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) the trial court erred by excluding expert testimony regarding respondent's mental state at the time of the killing. We affirm.

At the hearing, Detective Tom Kelly testified that on May 5, 2001, he spoke with the 13-year-old respondent at police headquarters regarding the shooting death of Joshua Adames (Josh). Respondent told Detective Kelly that earlier on May 5, he was home alone and called his friend Josh to come over. Josh said that he would be there in 20 minutes. While waiting for Josh, respondent went to the closet in his parents' bedroom and took a case off the shelf. The case contained three guns belonging to respondent's father, who was employed by the Cook County Sheriff's Department.

Respondent told Detective Kelly that he took out a nine-millimeter handgun and pulled back the slide, ejecting a live round. He put the live round back into the clip, and then put the clip into the gun. Respondent went to the window and saw a friend, Michael Pearce, riding his bike. Respondent invited Michael into his house and showed him the weapons. When showing Michael the nine-millimeter handgun, respondent again pulled back the slide, ejecting a live round. He again dropped the clip out of the gun. He then put the live round into the clip and placed the clip into the gun. Respondent jokingly told Michael that he was "trigger-happy" and that he intended to shoot Josh.

After Josh arrived, respondent pointed the nine-millimeter gun at him and jokingly stated that he was going to shoot him. Once again, respondent pulled back the slide, ejecting a live round. He dropped the clip out the gun and placed the live round in the clip. This time, though, respondent did not put the clip into the gun. Instead, he aimed the gun at Josh and pulled the trigger. The weapon discharged, striki:.g Josh. Not realizing that Josh had been shot, respondent went upstairs and put away the guns. Respondent then came back downstairs, discovered that Josh had been shot, and called 911. Josh was rushed to the hospital, where he later died.

Respondent told Detective Kelly that he did not intend to actually shoot Josh, that he thought he had unloaded the gun by ejecting the live round and removing the clip.

Tanya Brubaker, a forensic scientist with the Illinois state police crime lab, testified that when respondent pulled back the slide, he ejected one live round from the chamber. However, when respondent released the slide, he caused a second live round to load from the clip into the chamber. This second live round remained in the chamber even after respondent removed the clip. When respondent pulled the trigger, the second live round discharged, striking Josh.

Officer Thomas Purtell testified that he went to respondent's house in response to a call of a person shot at that location. When he arrived at the scene, Officer Purtell saw paramedics working on Josh. Officer Purtell spoke with respondent, who was crying hysterically. Respondent told Officer Purtell that he had accidentally shot Josh.

Michael Pearce testified that on May 5, 2001, he was riding his bike near respondent's house when respondent called to him from out his window. Michael went inside respondent's house, and saw that respondent had guns in his hands. Respondent opened the barrel of one of the guns, a revolver, and showed Michael that there were no bullets inside. Respondent then showed Michael the nine-millimeter handgun. Respondent released the clip and showed Michael that there were bullets inside. Michael testified that respondent had no problem releasing the clip. Michael testified on cross examination that respondent thought all the bullets were in the clip, and that the gun was otherwise empty of bullets. Respondent jokingly told Michael that he was trigger-happy and that he intended to shoot Josh. When Josh arrived, Michael was in the computer room. Michael heard a loud noise, and went to the front door to see what had happened. Michael saw Josh lying on the floor. Josh stated that he had been shot; respondent then called 911.

Six of respondent's friends testified that they had never seen respondent in possession of a gun, and that respondent had never spoken to them about guns. Respondent's grandfather, Charles S., testified that he had never seen respondent handle a weapon and that he had never instructed or trained respondent in the use of firearms. Respondent's mother, Michelle S., testified that neither she nor her husband, David S., had ever instructed respondent about the use or safety of firearms. Michelle S. also testified that, to her knowledge, no one had ever given respondent any instructions relating to the use of firearms.

Doctor Peter Fink, a psychiatrist, testified that he conducted a clinical psychiatric examination of the respondent in July and August 2001. During the examination, respondent stated that he had never handled a handgun prior to the shooting, and that he had never received any training as to how to handle a firearm.

Doctor Fink further testified:

> "Q. Do you have an opinion as to whether [respondent's] actions at the time of the [shooting] were appropriate considering his age and lack of training and experience with a handgun?
>
> A. Yes, I do.
>
> Q. And what is that opinion?
>
> A. That they were in fact appropriate and consistent with his age, training, and experience.
>
> Q. And can you give the court the basis for that opinion?
>
> A. * * * [Respondent] specifically described to me the steps he took that made him feel that the gun was unloaded and what he did is that essentially three times he manipulated the slide on the weapon. On the third occasion, he did something different which is that he removed the clip. And if you look at that sequence of events, what that illustrates is that he seemed to feel that there was something about the clip that had to do with what we would call chambering a round * * *. He sort of convinced himself that if he removed the clip then there would be no way for the gun to be loaded in his concept of loaded.
>
> * * *

> Q. Do you have an opinion as to whether [respondent] acted impulsively with respect to his actions with the gun that you have just described?
>
> A. Absolutely not.
>
> Q. What is the basis for that?
>
> A. * * * He took steps to understand in his limited experience without training how that particular firearm worked with a specific goal of trying to determine that it was not loaded. And unfortunately he tragically failed but his steps without understanding the concept of chambering a round in an automatic weapon in my experience for someone his age was unusually careful,"

In finding respondent delinquent based upon involuntary manslaughter and reckless discharge of a firearm, the trial court explained why it found his actions to be reckless.

Specifically, the court stated:

> "I find that the minor did pull the trigger while it was pointed in the direction of the named victim at a time when he knew there were bullets in the gun. His actions prior to the shooting, of unloading and loading, removing the clip, shows sufficient knowledge as to the working elements of that firearm, that his actions in pointing that gun with the bullets in it and pulling the trigger in the direction of the named victim is a reckless act."

Respondent contends upon appeal that the trial court erred in finding him delinquent based upon involuntary manslaughter and reckless discharge of a firearm because the shooting was an accident. In support, respondent points to the evidence that he

believed he had removed all the bullets from the gun by removing the clip.

The State must prove the elements of the substantive offenses alleged in delinquency petitions beyond a reasonable doubt. *In re W.C.,* 167 Ill. 2d 307, 336 (1995). This court will not overturn a trial court's finding of delinquency unless, after reviewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the offenses beyond a reasonable doubt. *In re W.C.,* 167 Ill. 2d at 336.

A person commits involuntary manslaughter when he unintentionally kills another without lawful justification "if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly * * *." 720 ILCS 5/9-3(a)(West 2000). A person commits reckless discharge of a firearm by "discharging a firearm in a reckless manner which endangers the bodily safety of an individual" 720 ILCS 5/24-1.5(a)(West 2000). A person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2000).

Respondent points to the testimony of Michael Pearce, Officer Purtell, Detective Kelly, and Doctor Fink, all of whom testified that respondent told them he believed he had unloaded the gun by removing the clip prior to the shooting. Respondent contends said evidence establishes that the shooting was an acci-

dent, and does not support the trial court's finding that he acted recklessly.

The trial court discounted respondent's statements that he had no prior experience with firearms and he was unaware the gun was loaded at the time he pulled the trigger. The trial court found respondent's statements were contradicted by the evidence that he had correctly demonstrated multiple times how to pull back and release the slide to eject a live round from the nine-millimeter handgun and then unload and reload the clip. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude, as the trial court did here, that respondent was more familiar with the working elements of the firearm than he was admitting, that he knew how to load and unload the gun, and that he was aware that releasing the slide caused a bullet to rotate into the gun's chamber. Respondent nevertheless pointed the gun in the direction of the victim and pulled the trigger, without checking to see whether or not there was a bullet in the chamber. A rational trier of fact could conclude that by failing to verify that the gun was unloaded prior to aiming it at the victim and pulling the trigger, respondent acted with a conscious disregard of a substantial risk that he would cause great bodily harm or death. A rational trier of fact could also conclude that such disregard constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation. Accordingly, the evidence was sufficient to support the trial court's finding that respondent was delinquent based upon involuntary manslaughter and reckless discharge of a firearm. *See e.g., People v. Schwartz*, 64 Ill. App. 3d 989 (1978) (holding that the trier of fact could find defendant guilty of involuntary manslaughter where he failed to

check whether the gun was loaded prior to aiming it at the victim and pulling the trigger.)

Further, the evidence was sufficient to support the trial court's finding that respondent was delinquent based upon involuntary manslaughter and reckless discharge of a firearm even if respondent was not familiar with the working elements of the firearm, as he could not have been assured that the gun was unloaded even after the clip was out. Specifically, respondent knew the gun was potentially dangerous, as he admittedly was aware that the gun's clip contained bullets. Respondent was also aware that he had received no training regarding how to unload the firearm, and therefore he knew he could not be certain he had completely unloaded the weapon by removing the clip. Nevertheless, respondent disregarded the danger, pointed the gun at the victim and pulled the trigger. A rational trier of fact could find that by aiming the gun at the victim and pulling the trigger despite the lack of assurance that the gun was not loaded, the respondent consciously disregarded a substantial risk that he would cause great bodily harm or death. A rational trier of fact could also conclude that such disregard constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation. Accordingly, we affirm the finding of delinquency based upon involuntary manslaughter and reckless discharge of a firearm.

Respondent contends that *In re Interest of Landorf*, 7 Ill. App. 3d 89 (1972), compels a different result. In *Landorf*, the minor was cleaning a gun when his friend picked it up, cocked it, and pointed it at a wall. *Landorf*, 7 Ill. App. 3d at 90. Afraid that the gun would go off, the minor told his friend to put the gun

down. *Landorf*, 7 Ill. App. 3d at 90. The minor then unloaded the gun. *Landorf*, 7 Ill. App. 3d at 90. When the minor turned away, the friend reloaded the gun and gave it back to him. *Landorf*, 7 Ill. App. 3d at 90. Not knowing that the gun was now loaded, the minor held the gun in his hand and the gun "went off", striking his friend. *Landorf*, 7 Ill. App. 3d at 90. The trial court found the minor to be delinquent based, in part, upon the minor's reckless conduct in shooting his friend. *Landorf*, 7 Ill. App. 3d at 90. The appellate court vacated the adjudication of delinquency, holding that the minor did not act recklessly as he did not know that the gun was loaded at the time of the shooting. *Landorf*, 7 Ill. App. 3d at 91.

Landorf is factually inapposite. Unlike *Landorf*, the respondent here did not ensure that the gun was unloaded, and the victim did not reload the gun without telling him. Rather, as discussed, respondent failed to check the chamber to ensure that there were no bullets in the gun prior to aiming it at the victim and pulling the trigger. A rational trier of fact could find that respondent's conduct constituted recklessness.

Respondent next argues that the statutory definition of" recklessness" provides that the trier of fact must consider his age in determining whether he acted recklessly. As discussed, under the statutory definition of "recklessness," a person acts recklessly when he "consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow * * * and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2000). Respondent contends that the trier of fact must consider his age (13) in

determining whether he consciously disregarded a substantial and unjustifiable risk when pointing the gun at the victim and pulling the trigger. Respondent also contends that the trier effect must consider whether such disregard constitutes a gross deviation from the standard of care which a reasonable 13-year-old would exercise in the situation.

Even assuming, without deciding, that the statutory definition of "recklessness" provides that the respondent's age must be taken into account, a rational trier of fact could find that the 13-year-old respondent consciously disregarded a substantial and unjustifiable risk when aiming the gun at the victim and pulling the trigger. A rational trier of fact could also find that such disregard constituted a gross deviation from the standard of care which a reasonable 13-year-old would have exercised in the situation. See our discussion above concerning the sufficiency of the evidence. Accordingly, we affirm the trial court's finding that respondent was delinquent based upon involuntary manslaughter and reckless discharge of a firearm.

Next, respondent argues that the trial court erred by refusing to allow his expert, Doctor Fink, to testify regarding respondent's mental state at the time of the shooting. Expert testimony is proper where such testimony is needed to explain matters beyond the common knowledge of ordinary persons and helps the fact finder in reaching a conclusion. *People v. Gilliam*, 172 Ill. 2d 484, 513 (1996). The admission of expert testimony is within the discretion of the trial court, which we will not disturb absent an abuse of discretion. *People v. Nestrock*, 316 Ill. App. 3d 1, 11 (2000).

The trial court allowed Doctor Fink to testify regarding scientific principles of adolescent development and the way in which those developmental principles affected the juvenile respondent's understanding and appreciation of risk. Such testimony was beyond the common knowledge of the fact finder and was properly admitted. The trial court refused to allow Doctor Fink to testify to the ultimate conclusion as to whether respondent was reckless at the time of the shooting; the court determined that it could decide for itself, after hearing all the testimony, whether respondent acted recklessly in shooting the victim. We find no abuse of discretion.

For the foregoing reasons, we affirm the circuit court.

Affirmed.

O'BRIEN, J., with REID, J., and HARTIGAN, J., concurring.

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NO. 09-253

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IN THE

Supreme Court of the United States

HECTOR ADAMES, JR., *ET AL.*,
Petitioners,

v.

BERETTA USA CORPORATION, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Beretta's response in opposition is an exercise in misdirection. First, Respondents ask the Court to ignore the important federalism issue presented to the Court because an exception in the statute at issue does not apply to the facts in this case. In so doing, Respondents fail to respond to Petitioners' argument that the statute as a whole raises serious and important federalism concerns of national importance and that the federalism issue worthy of this Court's attention is exemplified by that exception, which does not apply to this case simply because Illinois has chosen to have its judiciary, not its legislature, establish its product liability standards. Respondents are wrong in suggesting that Petitoners' federalism issue was not raised below. Petitioners raised it, and the Illinois Supreme Court addressed it. It is properly before this Court for its review.

Second, Respondents gloss over the split in the circuits about the proper standard to apply to Tenth Amendment challenges by labeling some circuits as merely "wrong," as if that erases the circuit split. Respondents also argue that there can be no Tenth Amendment violation where Congress relies upon its Commerce Power. Respondents' unduly broad reading of the Commerce Power highlights the importance of the issues in this case because Respondents give deeply problematic short shrift to the federalist system embodied in our Constitution and overstate this Court's precedents. By doing so, Respondents make clear that the Court's guidance is needed to define the constitutional barriers against

federal intrusion into state law-making functions under the Tenth Amendment.

Finally, on the matter of statutory interpretation, Beretta does not deny that the legislative history indicates that the statute was intended to preserve product liability cases such as this and was actually directed at municipal public nuisance lawsuits, but Respondents argue the language of the statute plainly evinces an opposite meaning. However, Beretta fails to contest that the Illinois Supreme Court's ruling demonstrates that the Act's meaning is unclear at best and that resort to legislative history is needed to understand its terms and avoid a construction of the Act contrary to Congress's intent. The Illinois Supreme Court dismissed even the failure to warn claim by finding that the unintentional act of shooting death of Josh Adames was "volitional," a distinction that the statute does not settle and that legislative history properly informs. Thus, the construction of this federal statute, as well as its constitutionality, presents issues worthy of the exercise of this Court's discretion.

I. WHETHER THE PLCAA VIOLATES THE TENTH AMENDMENT IS AN ISSUE OF GREAT NATIONAL IMPORTANCE THAT WAS PRESENTED TO AND DECIDED BY THE ILLINOIS SUPREME COURT AND IS PROPERLY BEFORE THIS COURT

In the face of a circuit split on the proper analysis under the Tenth Amendment, Respondents choose to focus on one particular part of the statute in issue to divert this Court's attention from the question properly before it. The question presented

by the Petition is whether the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901, *et seq.*, violates the Tenth Amendment. The Petition details the split in the circuits in handling Tenth Amendment challenges and demonstrates the need for this Court's guidance. The proper handling of Tenth Amendment challenges is also an issue of great national importance that is certain to be repeated any time Congress purports to preempt only the States' common law but not its legislated law under the guise of its power under the Commerce Clause.

Contrary to Respondents' apparent claim,[1] federalism and the Tenth Amendment issue were raised by Petitioners below and were squarely addressed by the Illinois Supreme Court. Pet. App. 43a-45a. Petitioners challenged, and the Illinois Supreme Court ruled on, the constitutionality of the PLCAA. In their opening brief in the Illinois Supreme Court, Petitioners argued, just as they do here, that Section 7903(5)(A)(iii) crystallizes the Tenth Amendment violation by the PLCAA by dictating to the States which branch of their respective governments can make the law of the States that Congress is willing to recognize. Relying entirely on the Second Circuit's reasoning in *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), and providing no separate reasoning of its own, the Illinois Supreme Court applied an unduly narrow Tenth Amendment standard in rejecting Petitioners' constitutional challenge. *Id.* at 45a.

The issue presented in the Petition was both pressed and passed upon in the Illinois Supreme

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[1] Br. in Opp. 8-9.

Court, and this Court may exercise jurisdiction over this matter under § 1257(a). It is of no moment that the Illinois Supreme Court did not, as Respondents point out, cite this specific subsection that demonstrates the Tenth Amendment violation in its opinion.[2] Nor is it relevant to Petitioners' Tenth Amendment challenge that this particular subsection does not apply in this case. After all, it is precisely the limited reach of the subsection, favoring legislative authorization of lawsuits over judicial authorization of the same cause of action, that comprises Congress's unconstitutional overreaching. Indeed, Beretta does not dispute that had the Illinois legislature codified its product liability and warning standards, the Act would have supported allowing Adames' claims, though identical in every way to the common law claims that were dismissed.

Essentially, Respondents wish this Court to view the PLCAA as something it is not: an Act that broadly preempts firearms liability cases, without distinguishing between those based on standards established by the judicial, as opposed to the legislative, branches of state governments. However, as Respondents themselves recognize, Section 7903(5)(A)(iii) is *evidence* of Congress's unconstitutional purpose in enacting the PLCAA. *See* Brief in Opp. 8. Regardless of whether Section

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[2] The Second Circuit opinion relied upon by the Illinois Supreme Court extensively discussed the subsection that is the lynchpin of what Petitioners submit is a blatant and serious Tenth Amendment violation. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390, 396-97 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (2009).

7903(5)(A)(iii) actually applies to the Petitioners' claims, it provides stark testimony of the unconstitutional purpose and impact of the law. Simply put, the unavailability of the exception creates the constitutional flaw. Thus, it is relevant to this Court's consideration of whether to grant the Petition, as well as the merits of Petitioners' Tenth Amendment arguments. Respondents would have the Court overlook this intrusion into state sovereignty because other subsections of the statute do not make the same intrusion. But Section 7903(5)(A)(iii) and the purposes and legislative history of the PLCAA make the entire statute constitutionally infirm. This issue is properly before the Court for its review.

II. RESPONDENTS' ATTEMPT TO GLOSS OVER THE EVIDENT CIRCUIT SPLIT IS UNAVAILING

While Respondents gloss over the split in the circuits about the proper standard to apply in Tenth Amendment challenges, the circuit split is clear and merits the Court's review.

By upholding the PLCAA as constitutional, the Illinois Supreme Court, like the Second Circuit before it, improperly narrowed the Tenth Amendment's protection of state sovereignty and, with it, each State's authority to lodge the lawmaking function in the branch or branches of its choice. To them, that issue is determined by a simplistic and uninformative inquiry into whether Congress has commandeered state executive or legislative branch officers by requiring them to undertake affirmative actions on behalf of the federal government. The court did not note or discuss the

broader scope given to the Tenth Amendment by this Court or by other courts of appeal.

As the Petition illustrates, there is a significant split in the lower courts regarding the proper analysis to apply in Tenth Amendment challenges. The First, Fourth, and Tenth Circuits all approach Tenth Amendment challenges by looking beyond the question of whether Congress had commandeered the states and inquire into whether the legislation effectively regulates the "states as states," thereby impermissibly invading core aspects of state sovereignty. *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir.), *cert. denied*, 522 U.S. 904 (1997); *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997).

Despite Respondents' assertion that the standard employed by these courts was overruled by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), all of these cases post-date the decision in *Garcia*, and the Court did not grant certiorari to review these circuit decisions when presented with petitions. Moreover, *Garcia's* reliance on the political process to protect state interests, *id.* at 552, is patently insufficient to protect States' "residuary and inviolable sovereignty." THE FEDERALIST No. 39, 285 (B. Wright ed. 1961) (J. Madison). It would not have, for example, protected Oklahoma's sovereign right to determine the location of its capital. *See Coyle v. Smith*, 221 U.S. 559 (1911). Thus, relying on *Coyle*, this Court has reiterated that despite "substantial powers" vested in Congress, "including in areas of intimate concern to the States, the Constitution has

never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

The standards applied by the circuits recognizing more to Our Federalism than an anti-commandeering mandate, as well as those employed by the Third and Fifth Circuits, are consistent with this Court's Tenth Amendment jurisprudence, which is *not* limited to looking at only whether a federal law "commandeers" state governments. The Tenth Amendment standard used by these courts conflicts with the standard used by the Illinois Supreme Court, which is the same standard applied by the Second, Seventh, and District of Columbia Circuits,[3] which limits the Tenth Amendment inquiry to the question of whether Congress has commandeered State officials.

Although it is also clear that using the standard employed by the First, Fourth, and Tenth Circuits, the PLCAA is an unconstitutional violation of the Tenth Amendment, Respondents try to gloss over the difference between the standards by asserting that these very different standards are "entirely consistent" with each other. *See* Opp. 13. Respondents' mere incantation of the words "entirely consistent" does not make it so. The PLCAA clearly fails the test employed by the First, Fourth and Tenth Circuits, as the Act infringes on states' authority to determine which branch of state government establishes liability standards to be applied by state courts, the determination of which are "attribute[s] of state sovereignty" that would

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[3] *See* Pet. 15-17.

"impair [a state's ability] 'to structure integral operations in areas of traditional governmental functions.'" *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (citation omitted).

The standard employed by the Illinois Supreme Court is inconsistent with this test. Not only did the Illinois Supreme Court not attempt to apply the standard applied in these other courts, it did not even acknowledge that the standard exists or that it is countenanced by this Court's jurisprudence. Instead, it applied a test under which the only way Congress can violate the Tenth Amendment is by enacting a law that commandeers the states' executive officials or legislative processes. The Illinois Supreme Court did not inquire into whether the PLCAA impermissibly intrudes upon key elements of state sovereignty, such as the division of state law-making authority.

The clear conflict between the Illinois Supreme Court's decision, as well as decisions of the Second, Seventh, and District of Columbia Circuits, with decisions of the First, Fourth, Fifth, and Tenth Circuits strongly suggest the need for resolution by this Court.

III. THE UNDULY BROAD READING OF THE COMMERCE CLAUSE AND UNDULY NARROW READING OF THE TENTH AMENDMENT BY THE ILLINOIS SUPREME COURT AND THE RESPONDENTS ILLUSTRATE WHY REVIEW IS WARRANTED

The primary thrust of Respondents' argument on the merits of the important Tenth Amendment question before the Court can be boiled down to one broad statement regarding the sweep of the Commerce Clause: "Since the Commerce Clause authorized Congress to enact the PLCAA, the Tenth Amendment is therefore not implicated." Opp. 12 (quotation and citation omitted). This statement underscores the inadequacy of an approach to Federalism that ignores the reach and content of the law Congress has enacted. Even if legitimate exercise of the Commerce Power often forecloses any Tenth Amendment claim, the substance of the law can arrogate to Congress power it does not have.

This Court recognized precisely the limits of such a test in *RAV v. City of St. Paul*, 505 U.S. 377 (1992). Although some areas of speech fall outside the First Amendment's ambit and protection because of "constitutionally proscribable content (obscenity, defamation, etc.)," the government may not exercise that power by engaging in content discrimination. *Id.* at 383. Thus, for example, "government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.* at 384. As this Court concluded in the First Amendment area, "[s]uch a simplistic, all-or-nothing-at-all approach to First

Amendment protection is at odds with common sense and with our jurisprudence as well." *Id.*

The same conclusion about a "simplistic, all-or-nothing-at-all approach" could be drawn about the federalism inquiry that the Illinois Supreme Court employed and Respondents urge here. After all, all Tenth Amendment challenges necessarily call into question the validity of the exercise of Congressional power. For instance, when the Fourth Circuit upheld the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228 (2000), it explained that a Tenth Amendment challenge to a federal statute involves *two* questions: (1) whether the law falls within the enumerated powers of Congress; and (2) whether the means of regulation employed impermissibly infringes upon state sovereignty. *United States v. Johnson*, 114 F.3d at 480 (citing *New York*, 505 U.S. at 159, 188). *Cf. Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("In determining whether the congressional action violates the limitations of the tenth amendment, we must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions."). Respondents, like the Illinois Supreme Court, would have this Court do away with the second part of the analysis altogether.

Respondents' view of the Commerce Clause is overbroad. In their view, once the Commerce Clause is invoked, there can never be a federalism dispute. However, this approach takes the Commerce Clause too far. If, in Justice Kennedy's words, federalism represents the Framers attempt to "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514

U.S. 779, 838 (1995) (Kennedy, J., concurring), a jurisprudence that relies on the political sensibilities of Congress or a simple anti-commandeering test, will re-fuse the atom of sovereignty, throwing the Framers' accomplishment into the dustbin of history. It will lodge a virtually unlimited power of Congress to regulate state government under the unlimited guise of interstate commerce. This Court's jurisprudence reveals, however, that the Respondents' position is severely flawed.

Respondents' position assumes a positive answer to the first question in the Tenth Amendment inquiry laid out by several circuits and by this Court "ends the analysis." Opp. 12. Yet, as this Court has recognized, the fact that Congress exercised its powers under the Commerce Clause "does not conclusively resolve the constitutionality of the [statute]." *Reno v. Condon*, 528 U.S. 141, 149 (2000). Reviewing earlier decisions, the *Reno* Court said that this Court held various federal statutes invalid, "*not* because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment." *Id.* (emphasis added).

Even in the cases cited by Respondents, in a Tenth Amendment challenge, the Court *begins* with the question of whether Congress validly exercised one of its enumerated powers. *See McConnell v. Federal Election Commission*, 540 U.S. 93, 186-87 (2003); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). By challenging the constitutionality of the PLCAA under the Tenth Amendment, Petitioners put the validity of the congressional exercise of its Commerce Power at issue, as this is the first part of

the Tenth Amendment analysis. *Johnson*, 114 F.3d at 480; *Bongiorno*, 106 F.3d at 1033; *Hampshire*, 95 F.3d at 1004. The validity of the congressional action is always implicated in a Tenth Amendment challenge.

As Petitioners demonstrated in their Petition, the PLCAA is not standard economic regulation under the Commerce Clause in which Congress defines legal duties regarding some aspect of interstate commerce and sweeps aside state regulation in the field. *See FERC v. Regulatory Comm'n*, 456 U.S. 742, 759 (1982). Instead, Congress's purpose in enacting the PLCAA was to prevent a "maverick judge or petit jury" from imposing civil liability against a firearms manufacturer, dealer, or importer, without prior legislative approval. This does not qualify as "commerce," as this Court has defined it. *See United States v. Lopez*, 514 US 549, 558-59 (1995). State courts are neither channels nor instrumentalities of interstate commerce. Rather, they are governmental bodies that adjudicate the law. Even if courts could be instrumentalities of commerce, the distinction between judicial action, which Congress disapproved of, and legislative action, which Congress approved of, cannot be the basis of a constitutionally valid distinction.

However Congress may achieve its commercial goals, it may not do so by interfering with the States' choices about which branch of their government can authoritatively declare its law. As Justice Kennedy observed:

> Were the Federal Government to take over the regulation of entire

> areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

Lopez, 514 U.S. at 577 (Kennedy, J. concurring) (citations omitted).

This Court has frequently taken responsibility to review congressional attempts to alter the federal balance of power, even where it has exercised one of its enumerated powers. Where, as here, Congress attempts to extend the reach of its power under the Commerce Clause to any activity that has a commercial origin or consequence, the Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Id.* at 580. Respondents would do away with that inquiry.

Under the second part of the Tenth Amendment inquiry, it is clear that Congress intended to intrude upon an area of traditional state governance—the way state courts make state law. Although Respondents contend that it was a proper exercise of the Commerce Power and is simply a standard variety federal law that preempts state

law, it is not. Under the PLCAA, states retain their discretion to define the legal duties of firearms dealers and manufacturers and create causes of action for breaching those duties. However, Congress directed that this state authority must be exercised through statutes "applicable to the sale or marketing" of firearms, rather than more generally or through judicial construction of statutes or the common law equally "applicable to the sale or marketing" of firearms. 15 U.S.C. § 7903(5)(A)(iii). Thus, Congress evinced no intention to preempt state law; passage of a statute reclaims the authority for the state. Instead, Congress only sought to displace state judicial authority. That power, however, is "reserved by the Constitution to the several States." *Erie R. Co. v. Tomkins*, 304 U.S. 64, 80 (1938).

As Petitioners maintained below, the issue is not whether Congress has the power to preempt state common law, but whether it impermissibly sought to limit the liability of gun manufacturers by dictating to the States that only their legislative branches, and not their courts, can create the law of liability. Respondents' broad reading of the Commerce Clause imbues the Commerce Power with such authority that it has no limits. Their argument regarding the reach of the Commerce Clause only highlights the importance of the issue presented to the Court for review.

IV. CONGRESS EXPRESSED NO INTENT TO PREEMPT TRADITIONAL PRODUCT LIABILITY ACTIONS

Respondents cannot effectively dispute that the PLCAA was clearly intended to preserve, not prohibit, product liability cases such as this. Beretta

cannot contest the clear expressions of legislative intent that the PLCCA was enacted to end municipal public nuisance lawsuits against gun manufacturers and distributors, a form of liability that Congress found to be "without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). Congress further exempted most product liability actions from the sweep of the PLCCA's immunity provisions, including actions "for death, physical injuries or property damage resulting directly from a defect in design . . . when used as intended or in a reasonably foreseeable manner." 15 U.S.C. § 7903(5)(A)(v).

Instead, Respondents argue that this statutory language, as well as the legislative history, should be ignored, and the Act should be read to bar cases Congress assertedly wished to preserve. Beretta argues that the meaning of the products liability exemption for "a volitional act that constituted a criminal offense," *id.*, is in no way ambiguous, but plainly bars this case where, as a result of Beretta's defective design, 13-year-old Billy Swann believed his father's Beretta handgun was unloaded, and then pulled the trigger, unintentionally—and fatally—shooting his friend, Josh Adames.

Beretta does not dispute that a feasible safety device would have prevented Josh Adames's death or that Beretta's failure to warn owners of risks could support liability under traditional Illinois products law. Nor does Beretta dispute that this lawsuit would not have been dismissed under the PLCAA, if the Illinois's legislature had enacted a statute specifically applying Illinois products liability law to

the sale and marketing of firearms. It merely insists that a plain reading of the statute gives it complete immunity.

However, Beretta can point to no evidence that Congress intended to provide victims of such preventable shootings with no remedy against manufacturers, such as Beretta, who could have easily prevented them and would otherwise be liable under longstanding state tort law. Indeed, there is no dispute that Congress intended precisely the opposite: to preserve such claims. Nor is there any evidence of congressional intent to relieve Beretta of responsibility for outfitting the gun with a safety mechanism invented more than 100 years ago to prevent the unintentional discharge of a cartridge.

The Illinois Supreme Court strained to make Billy's act of pulling the trigger the type of "volitional act that constituted a criminal offense," *see* Pet. App.42a-43a, highlighting that the meaning of "volitional" is not sufficiently clear to have courts ignore the Act's purposes and findings, and Congress's legislative intent. The question presented on this issue of statutory construction is whether Congress contemplated providing a gun manufacturer with immunity for failing to include such a safety mechanism that would have prevented tragic events like this one, which are all too common.

Respondents urge a plain-language approach to statutory construction, Opp. 19-20. Yet, the Illinois Supreme Court found that language less than transparent, consulting both Black's Law Dictionary and Webster's Third New International Dictionary to divine the meaning of "volitional." Where it departed from the appellate court it reversed and Petitioners

was whether the act of volition was the shooting (which was clearly unintended) or an intent to pull the gun's trigger (of a gun whose defective design led Billy to believe it was unloaded). The statute does not make plain that such unintentional shootings are "volitional" criminal acts and resort to the legislative record was thus in order.

Because the Illinois Supreme Court authoritatively construed a federal statute in a manner that employs rules of statutory construction at odds with those employed by the circuits, *see* Pet. 32-33, this case presents an issue of great national importance and one in which the circuits are in conflict. The case merits this Court's exercise of its certiorari discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 09-253

In the

Supreme Court of the United States

HECTOR ADAMES, JR. and ROSALIA DIAZ, as Co-Special Administrators of the Estate of JOSHUA ADAMES, Deceased,

Petitioners,

v.

BERETTA U.S.A. CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE AND BRIEF OF CHILDREN'S DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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SEPTEMBER 2009

In the

Supreme Court of the United States

No. 09-253

HECTOR ADAMES, JR. and ROSALIA DIAZ, as Co-Special Administrators of the Estate of JOSHUA ADAMES, Deceased,

Petitioners,

v.

BERETTA U.S.A. CORPORATION,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF CHILDREN'S DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, Children's Defense Fund ("CDF") hereby requests leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the Supreme Court of Illinois. Counsel of record for all parties received notice of CDF's intention to file this brief on September 16, 2009, pursuant to Rule 37.3(a) of the Rules of the Supreme Court of the United States. Petitioners Hector Adames, Jr. and Rosalia Diaz have consented to the filing of this brief. Respondent Beretta USA Corporation has not consented.

As set forth in the accompanying brief, Children's Defense Fund is a non-profit advocacy organization devoted to improving the lives of all children in America. CDF is especially concerned about the harmful effects on children of gun violence. Since 1999, CDF has monitored gun violence against children, publishing its findings annually in its *Protect Children, Not Guns* report. CDF is concerned that the Supreme Court of Illinois incorrectly construed the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7902 *et seq.*, to bar a design defect claim against a gun manufacturer arising out of the accidental killing of a child by another child.

Accordingly, Children's Defense Fund respectfully requests leave to file the accompanying amicus curiae brief.

Respectfully submitted,

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QUESTION PRESENTED

Amicus addresses only the question whether the Supreme Court of Illinois correctly construed the Protection of Lawful Commerce in Arms Act, which does not preempt actions "resulting directly from a defect in design" except in cases involving "a volitional act that constituted a criminal offense," 15 U.S.C. § 7903(5)(A)(v), to bar a design defect claim against a gun manufacturer arising out of the accidental killing of a child by another child.

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INTEREST OF *AMICUS CURIAE*

The Children's Defense Fund ("CDF") is a non-profit child advocacy organization devoted to improving the lives of all children in America.[1] CDF champions policies and programs designed to lift children out of poverty, shield them from abuse and neglect, help them to gain access to health care and a quality education, and provide them a moral and spiritual foundation. Since 1999, CDF has monitored gun violence against children, publishing its findings annually in its *Protect Children, Not Guns* report. CDF has long recognized that firearm-related deaths and injuries to children and teens are a significant public health problem both in terms of their impact on children's physical and mental health and the cost to the public health system in the United States.

INTRODUCTION

Every day, almost nine children and teens die by gunfire. Children's Defense Fund, *Protect Children, Not Guns* 2 (2009) (hereinafter *Protect Children, Not Guns*). After a decade of decline, the number of firearm-related deaths and injuries among children

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[1] Counsel of record for all parties received notice of CDF's intention to file an amicus brief at least 10 days prior to the due date of the brief. As noted in the accompanying Motion for Leave to File Brief of Children's Defense Fund as *Amicus Curiae* in Support of Petitioners, Petitioners have consented to the filing of this brief. Respondent has not consented. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than CDF or its counsel made a monetary contribution to the preparation or submission of this brief.

and teens increased for the second year in a row. According to the most recent data from the Centers for Disease Control and Prevention, a total of 3,184 children and teens died from gunfire in the United States in 2006, a six percent increase over 2005. A total of 17,451 children and teens were victims of non-fatal firearm-related injuries in 2006, a seven percent increase over 2005. Many of these tragic deaths and injuries could have been avoided if the guns had been designed with simple gun safety mechanisms. Gun manufacturers like respondent Beretta U.S.A. Corporation ("Beretta") should not be allowed to escape liability for accidental injuries and deaths, including the death of Josh Adames, when they failed to incorporate a simple and inexpensive gun safety mechanism into their firearms.[2]

On May 5, 2001, 13-year-old Billy Swan accidentally shot and killed his friend, Josh Adames, with Billy's father's Beretta 92FS handgun.[3] Billy, while home alone, had invited Josh over to play. While waiting for Josh, Billy noticed that his parent's closet door was partially open. He found a lockbox on the top shelf, opened it, and found the Beretta 92FS, a semiautomatic nine-millimeter pistol. Billy had never handled a gun before.

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[2] CDF supports granting certiorari on the third issue raised in the Petition – whether the Illinois Supreme Court correctly interpreted the Protection of Lawful Commerce in Arms Act to preempt petitioners' design defect claim. CDF's brief does not address the two constitutional issues presented by petitioners.

[3] These facts are drawn from the Illinois Supreme Court's opinion. Pet. App. 2a-5a.

Billy took the Beretta 92FS downstairs, along with two other guns that he had found in the closet. After Josh arrived, Billy, Josh, and another friend started to play with the guns. While the boys were playing, Billy removed the Beretta 92FS's magazine, into which the gun's ammunition had been loaded. Billy assumed – not unreasonably for a child who has never used any gun, let alone a Beretta 92FS – that after removing the magazine, the gun was unloaded. However, unbeknownst to Billy, due to the design of the Beretta 92FS, a bullet remained in the gun's chamber even after he removed the magazine.[4] Believing the gun to be unloaded, Billy aimed the gun at Josh and, pretending to shoot Josh, pulled the trigger. In doing so, Billy killed Josh, inflicting a fatal gunshot wound to his stomach. Upon realizing that the gun had gone off and wounded his friend, Billy immediately called 911 and reported that he had found a gun and accidentally shot his friend while playing with it.

Petitioners, the representatives of Josh's estate, sued Beretta in Illinois state court on several state

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[4] In general, handguns may be divided into two major categories: (1) revolvers, and (2) semi-automatic pistols. Jon S. Vernick et al., *"I Didn't Know the Gun Was Loaded": An Examination of Two Safety Devices that Can Reduce the Risk of Unintentional Firearm Injuries*, 20 J. Pub. Health Pol'y 427, 428 (1999) [hereinafter *Gun Was Loaded*]. A revolver holds ammunition in a rotating cylinder, while a pistol holds ammunition in a magazine containing ammunition cartridges. *Id.* When all of the ammunition cartridges are removed from the cylinder of a revolver, the gun is unloaded. *Id.* With a pistol, however, even if the magazine is removed, one cartridge may remain in the firing chamber, such that the gun may still be discharged. *Id.*

law theories of liability, including design defect, failure to warn, and breach of the implied warranty of merchantability. Although the trial court granted summary judgment in favor of Beretta on all of the estate's claims, the intermediate appellate court held that summary judgment was improperly entered in favor of Beretta on Petitioners' failure to warn claim. The intermediate appellate court held that the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), which had become law on October 26, 2005, barred the lawsuit against Beretta unless the remaining failure to warn claim fit within one of the PLCAA's exceptions, and remanded this issue to the lower court.

The PLCAA provides that a "qualified civil liability action" may not be brought in any state or federal court. 15 U.S.C. § 7902(a). The Act provides further that any qualified civil liability action pending as of October 26, 2005 "shall be immediately dismissed by the court in which the action was brought or is currently pending." *Id.* § 7902(b). A "qualified civil liability action" is defined in the PLCAA as "a civil action ... against a manufacturer or seller of [firearms or ammunition] ... for damages ... or other relief, resulting from the criminal or unlawful misuse of a [firearm]." *Id.* § 7903(5)(A). However, certain actions are expressly excluded from the definition of "qualified civil liability action," including actions for "death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner...." *Id.* § 7903(5)(A)(v) (hereinafter the "Defect Exception"). Such actions falling under this exception

are nonetheless deemed "qualified civil liability action[s]" where "the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.*

On appeal of the intermediate appellate court's decision, the Illinois Supreme Court held that the PLCAA required dismissal of Petitioners' case. *See Adames* v. *Sheahan*, 909 N.E.2d 742 (Ill. 2009). The Illinois Supreme Court determined that the action resulted from the "criminal or unlawful misuse" of a handgun because Billy was adjudicated delinquent in juvenile proceedings for involuntary manslaughter and reckless discharge of a firearm. *Id.* at 759. The Illinois Supreme Court further held that, in light of both this adjudication and the fact that Billy "did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger," the Defect Exception did not apply because the discharge of the handgun "was caused by a volitional act that constituted a criminal offense." *Id.* at 763.

SUMMARY OF ARGUMENT

Thousands of children are killed by guns each year. Thousands more suffer tragic gun-related injuries. Many of these deaths and injuries could be avoided if gun manufacturers incorporated simple and inexpensive gun safety mechanisms into their firearms. Moreover, the threat of meritorious products liability litigation provides an effective incentive for firearm manufacturers to take the steps necessary to ensure that their products are safe.

In enacting the PLCAA, Congress recognized the importance of this incentive by excluding from the

immunity granted to firearm manufacturers those cases where defective firearms cause death or bodily injury. Specifically, Congress enacted the PLCAA to shield firearm manufacturers only from liability for the *criminal* misuse of firearms. The Illinois Supreme Court's decision in this case, however, incorrectly reads the PLCAA as shielding Beretta from liability for the death of a boy at the hands of an unwitting child using a defectively designed gun. Allowing the Illinois Supreme Court's decision to stand would foreclose meritorious lawsuits against gun makers for the accidental killings of children and teens caused by defective firearms. As a result, firearm manufacturers like Beretta may "cut corners" on safety measures that could prevent thousands of deaths and injuries each year.

Nothing in the statute compelled the lower court's decision. The PLCAA does not preempt actions "resulting directly from a defect in design" except in cases involving "a volitional act that constituted a criminal offense." 15 U.S.C. §7903(5)(A)(v). Contrary to the court's reading of the statute, an accidental shooting of the sort that occurred in this case is not reasonably termed a "volitional act." Nor is it reasonably termed a "criminal offense" when juvenile proceedings are considered *civil* in nature.

This Court should grant the petition for certiorari because the Illinois Supreme Court has "decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Indeed, this case raises issues of the utmost importance, including the impact of firearms on children's physical and mental health and the cost to

the public health system in the United States. The thousands of children and teens killed or injured each year from firearms deserve this Court's attention.

ARGUMENT

The decision of the Illinois Supreme Court in this case presents an issue of national importance. First, it raises questions concerning the death or injury of children, our most precious national resource. Second, more than 20,000 children and teens were killed or injured by firearms in 2006 alone. This is a staggering number, and it is a number that may very well increase unless the decision below is reversed. Even at current or reduced levels, the number of children killed or injured by firearms in this country is unacceptable. The decision of the Illinois Supreme Court, if allowed to stand, will effectively immunize firearm manufacturers from lawsuits arising from accidental shootings of children caused by defects in their products, and thus remove a powerful incentive for such manufacturers not to cut corners when it comes to the safety of their guns. The interests of children call for nothing less.

I. Handguns – and Particularly Defective Handguns – Pose a Unique Danger to Children.

Young people are killed or injured by gunfire at an average rate of one every two hours and 45 minutes. *Protect Children, Not Guns*, at 2. In 2006, the 3,184 children and teens killed by gunfire in the United States would fill more than 127 public school classrooms of 25 students each. Of these victims,

2,225 were murdered, 763 committed suicide, and 196 died in accidental or undetermined circumstances. Sixty-three preschoolers were killed by firearms in 2006, compared to 48 law enforcement officers killed in the line of duty. Further, thousands more children and teens are injured each year by gunfire. For every unintentional firearm fatality, there are an estimated 13 additional victims injured seriously enough to be treated in hospital emergency rooms. Joseph L. Annest et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 J. Am. Med. Assoc. 1749, 1751 (1995). Many of these deaths and injuries, including those resulting from intentional shootings, could be prevented by simple design changes making it more difficult for children to use guns. The State of Illinois, which would be governed by the *Adames* decision should this Court allow the decision below to stand, sits near the top of these statistics, ranking fifth among states in the total number of children killed by firearms in 2006, and sixth in the total number accidentally killed by firearms that year. *See Protect Children, Not Guns*, at 6-7.

Moreover, many of these deaths and injuries by guns could have been avoided if the guns used had simple gun safety mechanisms. Nearly one-third of all unintended shootings are the result of design defects. Richard B. Ismach et al., *Unintended Shootings in a Large Metropolitan Area: An Incident-Based Analysis*, 41 Annals Emergency Med. 10, 13 (2003); *see also* U.S. Gen. Accounting Office, GAO/PEMD-91-9, *Accidental Shootings: Many Death and Injuries Caused by Firearms Could be Prevented*, at 2 (Mar. 1991) (estimating that "31% of accidental

deaths caused by firearms might be prevented by the addition of two safety devices").

For example, a 2003 study of 263 types of pistols made in the United States revealed that the vast majority of them failed to incorporate simple safety devices. John S. Milne et al., *Effect of Current Federal Regulations on Handgun Safety Features*, 41 Annals Emergency Med. 1, 5-6 (2003); *see also* Anil Ananthaswamy, *The Way of the Gun*, New Scientist, at 9 (July 12, 2003) (explaining the types of technological safeguards that could be incorporated into handguns). This study found that only 13% had a loaded chamber indicator, which indicates to the user that the gun's firing chamber has ammunition. Only 20% had a grip safety, which makes it harder for children to fire a gun. Only 21% had a magazine safety, which stops a pistol from firing once the magazine has been removed, even if a round remains in the chamber. A 1999 study is consistent with these results: out of 257 different pistol models, only 11% had a loaded chamber indicator and only 14% had a magazine safety. *Gun Was Loaded*, *supra* note 4, at 433-34.

II. Products Liability Lawsuits Against Firearm Manufacturers Can Lead to Safer Products.

The tragic – and avoidable – consequences posed by poorly designed or manufactured firearms as described above makes creating incentives for firearm manufacturers to ensure the safety of their firearms of paramount national importance. In this regard, meritorious products liability lawsuits against firearm manufacturers offer an effective

means of such deterrence, and can lead – and in some cases have led – to significant improvements in product safety.

Generally speaking, products liability litigation "can serve as a powerful tool for prevention" by transferring the cost of injuries "from the damaged person to the person or corporation who could have but did not prevent the injury...." Jon S. Vernick et al., *Role of Litigation in Preventing Product-Related Injuries*, 25 Epidemiologic Rev. 90 (2003) [hereinafter *Role of Litigation*].

This Court has repeatedly recognized the utility of state tort actions in creating an economic incentive for manufacturers to make safer products. *See, e.g.*, *Saratoga Fishing Co.* v. *J.M. Martinac & Co.*, 520 U.S. 875, 881 (1997) ("One important purpose of defective-product tort law is to encourage the manufacture of safer products. The various tort rules that determine which foreseeable losses are recoverable aim, in part, to provide appropriate safe-product incentives."); *accord Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449-50 (2005) (noting that "[t]he long history of tort litigation against manufacturers of poisonous substances ... emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items"); *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1202 (2009) (observing that in the context of the pharmaceutical industry, "[s]tate tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly"). Empirical evidence also suggests that potential

liability influences manufacturers' product design and warning decisions, creating an incentive for them to create safer products. *Role of Litigation*, *supra*, at 91 (citing various studies on the impact of product liability law on corporate behavior and decision making).

A prime example of the impact that product liability lawsuits can have on product safety can be found in litigation against automobile manufacturers. After all, it was out of a private state-law products liability action that the "crashworthiness doctrine," which required automobile manufacturers to make vehicles reasonably crashworthy due to the foreseeability of collisions, was born. *Larsen* v. *Gen. Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). As a result of this doctrine, automobile manufacturers universally improved the safety of their vehicles. *See* Jon S. Vernick et al., *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles*, 97 Am. J. Pub. Health 1991, 1995 (2007). Similarly, Ford Motor Company famously recalled its Pinto and changed its design after a Pinto passenger suffered disfiguring burns from a post-collision fire and sued Ford for damages relating to his injury. *See Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

Like automobile manufacturers, firearm manufacturers also appear to respond in significant ways to product liability litigation by improving product safety. For example, in 2000, Smith & Wesson, the Nation's largest handgun manufacturer, agreed to implement enhanced gun safety technology

and improve its monitoring of distributors and dealers to settle 15 lawsuits brought by municipalities. The gun maker agreed, among other reforms, to imprint a second, hidden serial number on its handguns, to put trigger locks on all of its handguns, to make its handgun grips bigger and its triggers more difficult to pull to reduce the ability of young children to fire the gun, and to implement "smart" gun technology to allow handguns to be fired only by authorized users. James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. Times, Mar. 18, 2000; *see also* Rachana Bhowmik, *Aiming for Accountability: How City Lawsuits Can Help Reform an Irresponsible Gun Industry*, 11 J.L. & Pol'y 67, 129 (2002); Ryan VanGrack, *Recent Development: The Protection of Lawful Commerce in Arms Act*, 41 Harv. J. on Legis. 541, 553-54 (2004). Meritorious product liability litigation can and does play a critical role in incentivizing improvements in product safety in the firearms industry, and in keeping the firearm-equivalent of the "Pinto" from being used by children.

III. The Illinois Supreme Court's Interpretation of the Defect Exception Improperly Immunizes Gun Makers in Cases Where Their Defective Guns Lead to Accidental Shootings by Children.

A. The Legislative History of the Act Confirms That It Was Intended To Foreclose Actions Against Gun Makers Arising From Criminal Misuse of a Firearm, Not From the Accidental Use of a Defective Firearm.

Lawsuits against gun manufacturers for accidental death or injury due to a defective gun have been brought under various state law theories of liability, including design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. The PLCAA was not intended to prevent such lawsuits. And the PLCAA was expressly not intended to prevent such lawsuits by child victims of gun violence.

Rather, Congress passed the PLCAA for the more limited purpose of ensuring that firearm manufacturers would not be held responsible for *criminal* misuse of firearms. As the Report of the House Judiciary Committee stated, "[i]f a company manufactures a legitimate product that is widely and lawfully distributed, and the product is criminally or unlawfully misused to injure a person, and the product is functioning properly, *without any defect in its design or manufacture*, a manufacturer should not be held liable for that injury." *Protection of Lawful*

Commerce in Arms Act Report, H.R. Rep. No. 109-124 (2005), at 23 (emphasis added).

This statement of intent carries significant interpretive weight, because, as this Court has recognized, "'the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represent the considered and collective understanding of those [members of Congress] involved in drafting and studying proposed legislation."'" *Eldred* v. *Ashcroft*, 537 U.S. 186, 210 n.16 (2003) (quoting *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969))). Further, as the Act itself indicates, one of the main purposes of the PLCAA is "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm *solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended*." 15 U.S.C. § 7901(b)(1) (emphasis added).

Statements by sponsors of the PLCAA also demonstrate that the Act was not intended to foreclose actions against gun manufacturers for accidental injuries or death resulting from the use of their defective products. As one of the sponsors of the PLCAA stated on the Senate floor:

> What this bill does not do is as important as what it does do. This is not a gun industry immunity bill.... This bill does not create a legal shield for anybody who manufactures or sells a

> firearm. It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. *It does not prevent them from being sued for their own misconduct. This bill only stops one extremely narrow category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control.* We have tried to make that limitation as clear as we possibly can and in several ways....

151 Cong. Rec. S9059, 9088 (daily ed. July 27, 2005) (statement of Sen. Craig) (emphasis added). Similarly, Senator John Thune of South Dakota, a co-sponsor of the bill, commented that "[t]he bill allows suits against manufacturers who breach a contract or a warranty, for negligent entrustment of a firearm, for violating a law in the production or sale of a firearm, or for harm caused by a defect in design or manufacture." 151 Cong. Rec. S9374, S9378 (daily ed. July 29, 2005) (statement of Sen. Thune).

Other Senators echoed Senators Craig and Thune in their descriptions of the purpose of the Act. *See, e.g.*, 151 Cong. Rec. S9374, S9389 (daily ed. July 29, 2005) (statement of Sen. Allen) ("This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [sic] the firearms dealer or manufacturer or defective product, a standard in product liability law."); 151 Cong. Rec. S9217, S9226 (daily ed. July 28, 2005) (statement of

Sen. Graham) (noting that the bill "doesn't relieve you of duties that the law imposes upon you to safely manufacture and to carefully sell," but does not extend "to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product").

In furtherance of this legislative intent, Congress enacted the Defect Exception as one of several exceptions to the type of action that must be dismissed. The Defect Exception excludes from mandatory dismissal actions "for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner." 15 U.S.C. § 7903(5)(A)(v). And, to give effect to Congress's intent to protect firearm manufacturers only from lawsuits arising from criminal misuse of non-defective firearms, the Defect Exception itself contains an exception "where the discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.*

Congress expressly intended to permit suits by child victims, even those victimized by children breaking the law. *See* 151 Cong. Rec. S9059, S9100 (daily ed. July 27, 2005) (statement of Sen. Craig) ("Language was added to this section of the bill to make clear that even if the person who discharged a defective product was technically in violation of some law relating to possession of the product, that alone would not bar the lawsuit."). For emphasis, Senator Craig, a sponsor of the PLCAA, provided an example: "[I]f a juvenile were target shooting without written permission from his parents-that is a violation of

current law ... -and was injured by defective ammunition, the juvenile would still be able to bring a suit against the ammunition manufacturer." *Id.*

In subsequently arguing (successfully) against the adoption of an amendment that would have expressly exempted actions brought by child victims from the Act's liability shield, Senator Craig again explained that such an amendment was unnecessary *because such actions were already exempted under the Act. See* 151 Cong. Rec. S9374, S9377 (daily ed. July 29, 2005) (statement of Sen. Craig) ("[I]f a child is injured by some wrongdoing of the gun industry, the lawsuits are not barred."). Senator Craig clarified that "[c]hildren are as protected under this proposed law as anyone else because this law says go after the criminal, don't go after the law-abiding gun manufacturer or the law-abiding gun seller." *Id.* As these remarks indicate, Congress intended only that gun manufacturers avoid liability for the acts of criminals. Congress did not intend to immunize gun manufacturers from their own wrongdoing.

Although some opponents of the PLCAA argued that the PLCAA "close[d] the courthouse doors to gun victims,"[5] this Court has recognized that "'[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.'" *Bryan* v. *United States*, 524 U.S. 184,

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[5] *See* 151 Cong. Rec. H8990, H9007 (daily ed. Oct. 20, 2005) (statement of Rep. Stark) ("As soon as the President signs this bill into law, Americans will be able to sue the manufacturer of any product except for guns for death, injury, and any other kind of negligence. Congress, at the behest of the NRA, will close the courthouse doors to gun victims.").

196 (1998) (quoting *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951)). Rather, "[i]t is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.*, 341 U.S. at 394-95. Statements by the PLCAA's sponsors, as well as the House Judiciary Committee Report, indicate that the Act was intended to protect firearm manufacturers only from lawsuits arising from the criminal acts of others, and not from any and all actions against gun manufacturers, particularly those arising from an accidental shooting by a child. As Senator Baucus, a co-sponsor of the bill that became the PLCAA, also explained: "This bill will not close the courthouse doors to legitimate suits against the firearms industry. It will not shield the industry from its own wrongdoing or from its negligence or if the industry puts out a bad product." 151 Cong. Rec. S9059, S9107 (daily ed. July 27, 2005) (statement of Sen. Baucus).

B. The Act of Billy Swan Cannot Reasonably Be Construed As a "Volitional Act That Constitutes a Criminal Offense."

This lawsuit is not an attempt to fix the blame of a third party's misdeeds on the manufacturer of a firearm. When Billy Swan pulled the trigger of the Beretta 92FS, he did not expect the gun to fire. Pet. App. 4a. Billy had removed the magazine from the gun and thought that the gun could not be fired if the magazine was removed.

Empirical data suggests that Billy's expectation was a reasonable one. In a poll conducted for The

Johns Hopkins Center for Gun Policy and Research, a representative sample of the U.S. adult population was asked whether a gun could be fired if the magazine was removed; over one-third of those surveyed either thought the gun could not be fired or did not know whether the gun could be fired. Of these, approximately one-fourth had a gun in their homes. *Gun Was Loaded*, *supra* note 4, at 430. Children, who are much less likely to be educated about the intricacies of gun design, may be even more likely to be unaware that a gun can fire even after the magazine is removed.

The Illinois Supreme Court's holding that the PLCAA requires dismissal of this case because the shooting of Josh Adames was a "volitional act that constituted a criminal offense" defies the common-sense conclusion that Billy killed Josh by accident. The record in this case amply supports the conclusion that Billy's conduct was accidental, not a "volitional act that constituted a criminal offense." As the Illinois Supreme Court itself recognized, Billy "thought [the gun] was unloaded when the magazine was taken out. He thought that the bullet came out of the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber." Pet. App. 4a.

Despite this fact, the court below found Billy's act to be volitional because he "did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger." *Id.* at 42a. This overly expansive interpretation of the term "volitional act," however, cannot be squared with the limits Congress intended to impose on the type of lawsuits from

which firearm manufacturers would be shielded under the Act. Although the Illinois Supreme Court looked to definitions of "volition" in both Black's Law Dictionary and Webster's Third New International Dictionary, *see id.*, these definitions reveal nothing about which "act" must be volitional under Section 7903(5)(A)(v). While the court below viewed the relevant "act" as the act of Billy pointing the gun at Josh and pulling the trigger, it could have just as easily viewed the relevant "act" as Billy's shooting of a *loaded* gun at Josh, which the record clearly demonstrates was not an act of choice. *See* Pet. App. 3a-5a.

The Illinois Supreme Court's view of "volitional act" as simply Billy's pulling of the trigger, regardless of his belief that the gun was not loaded, leads to a result wholly at odds with the intent of Congress. Billy's shooting of Josh was clearly accidental. The Illinois Supreme Court's reading of the term "volitional act" also runs counter to the well-established rule of statutory construction that "'in all cases of statutory construction, [the Court's] task is to interpret the words of the statute in light of the purposes Congress sought to serve.'" *Norfolk Redev. & Hous. Auth.* v. *Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 36 (1983) (quoting *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979)). Under the Illinois Supreme Court's reading of "volitional act," a child's intentional throwing of a loaded, defective handgun to the ground, thereby accidentally setting off a gunshot that kills or injures another, would be considered a "volitional act" shielding the gun manufacturer from liability. Taken to its logical extreme, this reading of the term

"volitional act" renders the Defect Exception meaningless.

The Illinois Supreme Court also wrongly concluded that the accidental discharge constituted a "criminal or unlawful misuse" under Section 7903(5) (and a "criminal offense" under Section 7903(5)(A)(v)) because Billy Swan was found delinquent in juvenile court proceedings. Under Illinois law, delinquency proceedings are civil, not criminal, in nature. *In re Rodney H.*, 861 N.E.2d 623, 630 (Ill. 2006) ("proceedings under the Act still are not criminal in nature"). "Delinquency proceedings are ... protective in nature and the purpose of the [Juvenile Court] Act is to correct and rehabilitate, not to punish." *In re W.C.*, 657 N.E.2d 908, 916 (Ill. 1995); *see also In re Armour*, 319 N.E.2d 496, 498 (Ill. 1974) ("The first purpose of [a juvenile court] statute is not to punish but to correct"). Indeed, "no suggestion or taint of criminality attaches to any finding of delinquency by a juvenile court." *In re Dow*, 393 N.E.2d 1346, 1349 (Ill. App. Ct. 1979) (citing *People ex rel. Hanrahan v. Felt*, 269 N.E.2d 1, 3 (Ill. 1971); *accord People v. Brazee*, 775 N.E.2d 652, 656 (Ill. App. Ct. 2002).

Subject to certain limited exceptions not applicable here, "no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State." 705 Ill. Comp. Stat. 405/5-120 (2009) (eff. until Jan. 1, 2010); *see also* 705 Ill. Comp. Stat. 405/5-130 (2009) ("The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree

murder, (ii) aggravated criminal sexual assault.... These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State."); *id.* 405/5-805 (describing conditions for the prosecution of a juvenile under Illinois criminal law upon the State's motion).

Illinois is not unusual. Juvenile offenders do not commit "crimes" under most state laws. *See, e.g.*, Preston Elrod & R. Scott Ryder, *Juvenile Justice: A Social, Historical, and Legal Perspective* 4 (2005). As this Court has recognized, the purpose of the juvenile adjudication system generally is to rehabilitate the child, not to punish crimes. *See In re Gault*, 387 U.S. 1, 15-16 (1967) (describing the history of the juvenile justice system) ("The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

Billy was not prosecuted under Illinois criminal laws, nor can his adjudication as delinquent be considered a determination that he engaged in a "criminal" act. Equating a juvenile delinquency adjudication to a "crime" for which the sponsors of the PLCAA did not intend for gun manufacturers to be punished ignores both the purposes of the juvenile justice system and the intentions of the sponsors of the PLCAA. The Illinois Supreme Court's faulty assumption that a juvenile delinquency adjudication is tantamount to a "criminal offense" leads to a result that is contrary to the PLCAA and, ultimately, to the interests of our Nation's children.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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v.

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF FOR *AMICI CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE, COALITION TO STOP GUN VIOLENCE, AND VIOLENCE POLICY CENTER IN SUPPORT OF PETITIONERS

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MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF

This motion and brief are filed pursuant to Rule 37.2(b) of the United States Supreme Court. Consent to file has been granted by counsel for the Petitioner but withheld by counsel for Respondent. Counsel for Respondent received from counsel for the Petitioner timely notice on June 5, 2009, of the impending filing of *amici*'s support for Petitioner but declined then, and again in a discussion with the undersigned counsel on September 21, 2009, to consent to the filing of this brief.

Amici curiae Legal Community Against Violence, Coalition to Stop Gun Violence, and Violence Policy Center hereby move this Court for leave to file the following brief. *Amici* declare as follows:

1. Identity and Interest of the *Amici Curiae*. *Amici* are described as follows:

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, LCAV has provided informed analysis in a variety of firearm-related cases, including the present case in the court below and other cases under the Protection of Lawful Commerce in Arms Act ("PLCAA"). *See Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *Adames v. Sheahan*, 233 Ill. 2d 276, 909 N.E.2d 742 (2009); *New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

Coalition To Stop Gun Violence

The Coalition to Stop Gun Violence is comprised of 48 member organizations working to reduce gun violence through research, strategic engagement and effective policy advocacy.

Violence Policy Center

Violence Policy Center ("VPC") is a national non-profit educational organization that conducts research and public education on firearms violence and provides information and analysis to policymakers, journalists, organizations, researchers, advocates, and the general public. VPC examines the role of firearms in the United States, analyzes trends and

patterns in firearms violence and works to develop policies to reduce gun-related deaths and injuries. VPC has conducted numerous fact-based studies on a full range of gun violence issues. These studies have influenced congressional policy-making and shaped congressional debates over gun control as well as state regulation of firearms. In 2002, VPC testified on the PLCAA before the Subcommittee on Commerce, Trade, and Consumer Protection of the House Committee on Energy and Commerce.

2. Desirability of an *Amici Curiae* Brief. *Amici* are civic organizations actively engaged in efforts to reduce gun violence and the destructive impact it has on local communities and urban centers. Because of the *amici*'s work and expertise in gun violence prevention, they bring a unique perspective on the Illinois Supreme Court's ruling.

3. Reasons for Believing that Existing Briefs May Not Present All Issues. This brief concentrates on certain practical and jurisprudential consequences of the Illinois Supreme Court's construction of the federal statute at issue. Although the parties unquestionably are represented by highly qualified counsel, no single party can completely develop all relevant views on the questions of exceptional national importance presented by this petition, including whether Congress overstepped its bounds under the Tenth Amendment in enacting the PLCAA, and whether section 4(5)(A)(v) of the Act, codified at 15 U.S.C. § 7903(5)(A)(v), must be construed, as the Illinois Supreme Court construed it, contrary to apparent Congressional intent and so as to obliterate vested rights under state law.

4. Avoidance of Duplication. Counsel of Record for *amici curiae*, Charles Dyke, has reviewed the facts of this case and considered the Petitioner's brief to avoid unnecessary duplication. We respectfully submit that this brief presents important information concerning the constitutionality of the PLCAA that is not addressed in the Petition.

5. Consent of the Parties or Requests Therefor. The Petitioner has consented to the filing of this brief, while counsel for the Respondent declined requests for consent by both Petitioner's counsel and the undersigned.

For these reasons, *amici curiae* respectfully request that they be granted leave to file the attached brief.

Respectfully submitted,

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BRIEF FOR *AMICI CURIAE* LEGAL COMMUNITY AGAINST VIOLENCE, COALITION TO STOP GUN VIOLENCE, AND VIOLENCE POLICY CENTER IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The interests of *amici* are set forth in the foregoing "Identity and Interest" section of the Motion of *Amici Curiae* for Leave to File Brief.[1]

[1] Counsel for Respondent received timely notice of the intent to file this *amicus* brief but declined to consent. Counsel for Petitioner also received timely notice and consented. Pursuant to Supreme Court Rule 37.6, *amici* state that this motion and brief were authored by the undersigned counsel, and that no counsel for a party authored this brief in whole or in part. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this motion and brief.

SUMMARY OF ARGUMENT

There is no general federal police power. Yet the Illinois Supreme Court's construction of 15 U.S.C. § 7903(5)(A)(v) presumes the existence of one. The Illinois Court held that Congress properly could and did, through the PLCAA, establish a new federal rule dictating when firearm and ammunition manufacturers and sellers can be held liable under *traditional state-law product defect actions* for harms caused, at least in part, by defects in their products. Compounding matters, this new congressional rule consists of a prohibition against the filing or maintaining of certain traditional state-law product-defect claims, *while substituting nothing in their place*. The Illinois Supreme Court held that these features of the PLCAA posed no federalism problems under the Tenth Amendment.

The importance of this question to the continuing vitality of the bedrock Tenth Amendment principle that the federal government is one of limited, delegated powers is obvious. As construed by the Illinois court, the PLCAA provides a roadmap for every political constituency and special interest group to obtain relief against any state rule—no matter how local the concern—they find disagreeable. That is a road to the extinction of "state sovereignty."

The consequence for individuals is equally bad. In many states, including Illinois, the common law provides that an accrued cause of action is a vested right that cannot be taken away. Yet the PLCAA as construed below allows Congress, under the guise of regulating commerce, to destroy such rights *without any obligation to provide a substitute*. Nowhere in the Constitution is Congress delegated such an

awesome power. The Tenth Amendment makes plain that Congress may not presume to have it.

ARGUMENT

WHETHER CONGRESS HAS THE POWER TO WIPE OUT TRADITIONAL STATE-LAW PRODUCT-DEFECT CLAIMS WHILE REPLACING THEM WITH NOTHING IS A MATTER OF VITAL IMPORTANCE TO OUR FEDERALIST STRUCTURE.

A. The Tenth Amendment Means What It Says.

The federal government's powers are limited to those delegated by the people in the Constitution. Powers not so delegated "are reserved to the States respectively, or to the people." U.S. Const. amend. X; *see Printz v. United States*, 521 U.S. 898, 919 (1997); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); *New York v. United States*, 505 U.S. 144, 155 (1992). The states and their political subdivisions are the branches of government with principal responsibility for "maintain[ing] and regulat[ing]" the safety of the people. *Federalist No. 17* (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Throughout the history of the republic, "the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically . . . matters of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citation omitted). In recent decades, the federal government has "played an increasingly significant role in the protection of the

health of our people." *Id.* But when Congress legislates in an area "traditionally occupied" by the states, such as tort law, there is a "'presumption against'" displacement of "'state police power regulations.'" *Id.* Indeed, given the historic primacy of state regulation of matters of health and safety," and the status of states as "individual sovereigns" in our federal system, the Court has "long presumed that Congress does not cavalierly pre-empt state law causes of action," particularly when it comes to state tort law remedies. *Id. See generally Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

B. The PLCAA Is Easily And Properly Construed To Preserve Many Product Defect Claims.

The court below never considered these principles in construing the language of the PLCAA. Instead, it simply construed an undefined term—the word "volitional" in 15 U.S.C. § 7903(5)(A)(v)—in a vacuum to give the statute its farthest displacing reach with respect to state-law product-defect claims.

The statute forbids the filing of any "qualified civil liability action" in federal or state court, and mandates the dismissal of any such pending action. 15 U.S.C. § 7902. A "qualified civil liability action" is defined as a civil action against a manufacturer or seller of a "qualified product" (*i.e.*, firearms or ammunition) for harms "resulting from the criminal or unlawful misuse" of the product. *Id.* § 7903(5)(A). Certain actions otherwise within this definition are specifically carved out, including an

> action for death, physical injuries or property damage resulting directly from a defect in design

> or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a *volitional* act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.

15 U.S.C. § 7903(5)(A)(v) (emphasis added). The Illinois Supreme Court interpreted "volitional" to mean "choose and determine to . . . pull the trigger" rather than intending to cause the discharge. *See* App. 42a, 46. This led the Court to conclude that Billy's accidental shooting of Josh was a criminal act covered by the Act. *Id.*

Had the Illinois Supreme Court considered the federalism principles captured in the Tenth Amendment, along with Congress's repeatedly stated intent in the PLCAA to bar only "novel" actions for harms "solely caused" by criminal acts,[2] it easily could and

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[2] The actions that Congress had in mind were those on behalf of municipalities or other governmental units seeking monetary relief for the cost of police and emergency medical teams to respond to incidents of gun violence. *See, e.g., Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245 (D.N.J. 2000) (plaintiff county alleged public nuisance, negligent entrustment, and negligence in marketing and distribution against defendant firearm manufacturers), plaintiff's claims dismissed and dismissal affirmed by U.S. Circuit Court of Appeals at 273 F. 3d 536 (3d Cir. 2001); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D. Pa. 2000) (city and certain civic organizations brought claims against firearms manufacturers for negligent distribution and public nuisance), plaintiff's claims dismissed, dismissal affirmed by U.S. Circuit Court of Appeals at 277 F.3d 415 (3d Cir. 2002); *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (Conn. 2001) (municipality brought suit against members of the firearms industry for violation of the Connecticut Unfair Trade Practices

should have construed "volitional" to require criminal intent, not mere affirmative conduct. Had it done so, actions not involving criminal intent, such as Petitioners', would have been preserved. This is certainly how the PLCAA's principal sponsor thought the statute would be applied. *See* Petition at 31 (quoting Senator Craig's floor statement that even if a person who discharges a defective gun is "technically in

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Act, public nuisance, civil conspiracy, and unjust enrichment based on, *inter alia*, increased cost of police and other services due to use of firearms in criminal activities); *Penelas v. Arms Technology, Inc.*, 778 So.2d 1042 (Fla. App. 2001) (county brought suit against gun manufacturers for negligence, strict liability for defective products, public nuisance, and ultrahazardous activities, to recover cost of responding to gun incidents); *People of New York v. Sturm, Ruger & Company, Inc.*, Case No. 402586/2000, (N.Y. Civ. Ct. 2003) (attorney general brought suit on behalf of the people of the State of New York against gun manufacturers for public nuisance arising from the manufacture and distribution of handguns that are illegally possessed and used within the state); *City of New York v. Arms Technology, Inc.*, Case No. CV 00 3641 (E.D.N.Y. 2000) (suit by city against multiple manufacturers and dealers for public nuisance, negligent and intentional entrustment, negligent design, negligent marketing and distribution, defective design, inadequate warnings, deceptive trade practices, false advertising, indemnity, restitution, unjust enrichment, and reimbursement of federal and state Medicaid expenditures); *City of Gary, Indiana v. Smith & Wesson Corp.*, Cause No. 45D029908CT 0355, (Ind. Super. Ct. 2001) (city filed suit against manufacturers and dealers for public nuisance, negligent distribution, marketing, and failure to warn, and negligent design); *City of Chicago v. Beretta U.S.A. Corp.*, No. 98-CH015596, (Ill. Cir. Ct. Cook County 1998) (city and county sued manufacturers, distributors, and dealers of handguns on public nuisance theory, seeking compensation for the costs of emergency medical services, law enforcement efforts, the prosecution of violations of gun control ordinances, and other related expenses).

violation" of a criminal law, "that alone would not bar" a defective-product lawsuit). Instead, the court construed the law contrary to evident Congressional intent and the federalist principles that underlie our government's structure.

C. This Court Should Decide Whether the PLCAA's Product-Defect Exclusion Unduly Interferes with State Sovereignty by Displacing Traditional Product-Defect Claims that Are Vested Under State Law and Replacing Them with Nothing.

In many states, including Illinois, a cause of action becomes a vested property right when it accrues or is filed, precluding the state government thereafter from taking it away. *See Johnson v. Halloran*, 194 Ill. 2d 493, 500-01 (2000); *Link by Link v. Venture Stores, Inc.*, 286 Ill. App. 3d 977, 979 (1997).[3] Whether the U.S. Constitution authorizes Congress to destroy such state-created rights without providing a substitute is a vital and unsettled question.

As a general proposition, Congress lacks the authority to make laws that retroactively abrogate vested rights. *E.g., Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 584-90 (1935). And as this Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), the "hallmark of property, the Court has emphasized, is an individual entitlement

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[3] Examples of other states include Arizona, *see Hall v. A.N.R. Freight Sys.*, 149 Ariz. 130, 140, 717 P.2d 434, 444 (1986) (en banc), North Carolina, *see Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982), and Wisconsin, *see Smith v. Sno Eagles Snowmobile Club, Inc.*, 823 F.2d 1193, 1195 n.4 (7th Cir. 1987).

grounded in state law, which cannot be removed except 'for cause.'" *Logan*, 455 U.S. at 430. The federal courts of appeals have held, however, that while a plaintiff has a property right in a tort cause of action, that right does not vest until the claim is reduced to final judgment. *E.g., Hammond v. United States*, 786 F.2d 8, 11-12 (1st Cir. 1986) (collecting and discussing cases); *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1141 (9th Cir. 2009).

These pre-PLCAA federal cases upholding the retroactive elimination of state-law tort and other claims involved statutory schemes in which Congress replaced the preempted laws with either a reduced remedy or an alternative scheme for redress. *E.g., Hammond*, 786 F.2d at 11-12; *Ileto*, 565 F.3d at 1150 (Berzon, J., dissenting) (discussing cases). The PLCAA, by contrast, is different because it completely wipes out certain claims, including Petitioner's, *with no alternative form of redress to replace them*. *Ileto*, 565 F.3d at 1150 (Berzon, J., dissenting) (arguing that the PLCAA at the least should be evaluated under a heightened scrutiny standard). This has particularly troubling Tenth Amendment implications, since the gun industry is outside the jurisdiction of the federal Consumer Product Safety Commission and beyond the reach of any other agency that might mandate safety standards. *See* Consumer Federation of America, *Buyer Beware: Defective Firearms and America's Unregulated Gun Industry*, at 5 (2005) *available at* http://consumerfed.org/topics.cfm?section=Health%20and%20Safety&topics=guns (last accessed September 25, 2009).[4]

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[4] The federal Bureau of Alcohol, Tobacco, Firearms and Explosives licenses manufacturers, dealers and importers but has no authority to prescribe safety standards.

The PLCAA is made all the more obnoxious by the fact that it accomplishes its displacement of state product-defect laws through the unconstitutional device of a conclusive presumption. Section 7903(5)(A)(v) provides that "where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage." This mandates a conclusive presumption that any volitional act that constitutes a criminal offense is the sole cause of harm, even though under common law tort principles both causes—the defect and the volitional act that constitutes a criminal offense—may be considered in determining whether liability is properly imposed on both the manufacturer of the defective product and the actor who discharged the firearm. *See* Restatement (Second) of Torts §§ 430-453, 501, 870 (1965); Restatement (Third) of Torts: Products Liability § 15 (1998); *see also Campodonico v. State Auto Parks, Inc.*, 10 Cal. App.3d 803, 807-08, 89 Cal. Rptr. 270 (1970); *McConnell v. Casco, Inc.*, 238 F. Supp. 2d. 970, 985 (S.D. Ohio 2003). Statutes that create arbitrary presumptions and deny affected parties a fair opportunity to rebut them are unconstitutional. *See Carella v. California*, 491 U.S. 263 (1989) (proof of failure to return rental vehicle yields conclusive presumption of theft); *Western & Atlantic R.R. v. Henderson*, 279 U.S. 639 (1929) (railroad deemed negligent in collisions between train and auto at grade crossing).[5]

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[5] *See also Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (pregnant teachers conclusively presumed to be unable to continue working during pregnancy); *Vlandis v. Kline*, 412 U.S. 441 (1973) (college tuition system denying persons fair opportu-

Whether Congress properly can effect the wholesale elimination of state-law product-defect claims, in such an arbitrary fashion and without providing a substitute remedial scheme, under the Tenth Amendment is a question of great national importance that this Court should decide.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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nity to prove residency); *United States Dep't of Agriculture v. Murray*, 413 U.S. 508 (1973) (welfare disqualification provision lacking individualized determinations); *Heiner v. Donnan*, 285 U.S. 312, 325 (1932) (transfers made within two years prior to decedent's death deemed to have been made in contemplation of death); *Hoeper v. Tax Com. of Wisconsin*, 284 U.S. 206, 215 (1931) (requiring wife's income to be added to husband's for purposes of calculating husband's income tax); *Manley v. Georgia*, 279 U.S. 1 (1929) (all bank insolvencies deemed fraudulent); *Bailey v. Alabama*, 219 U.S. 219 (1911) (conclusive presumption of fraud upon breach of personal services contract).